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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-

THE AMERICAN OIL COMPANY, ET AL., *Petitioners,*

v.

CITY OF PHILADELPHIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SIMON H. RIFKIND
Attorney for Petitioners,
Office and P.O. Address
345 Park Avenue
New York, N. Y. 10022
212-935-8000

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

JAY GREENFIELD
Of Counsel

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The petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit entered March 16, 1972. That judgment dismissed the petitioners' appeal from an order of the United States District Court for the District of New Jersey. The district court order directed disclosure of grand-jury testimony, with no showing of particularized need, to persons not even parties to the proceeding.

OPINION BELOW

The opinion of the court of appeals is unreported. A copy is appended as Appendix A hereto. The order of the District Court is unreported. A copy is appended as Appendix B hereto.

JURISDICTION

The judgment of the court of appeals was entered March 16, 1972. A timely petition for rehearing with suggestion for rehearing en banc was filed March 31, 1972. An order denying the petition for rehearing was entered April 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the court of appeals err in letting stand an order of the district court requiring wholesale disclosure of secret grand-jury testimony to *"amici curiae"* not even parties to the proceeding, with no showing of particularized need as required by past decisions of this Court?

2. Did the Court of Appeals err in dismissing the appeal solely on the ground that the petitioners—parties defendant in the district court—lacked standing before that court to object to an order compelling the disclosure of their grand-jury testimony to persons not even parties to the proceeding?

RULES INVOLVED

Rule 6(e) of the Federal Rules of Criminal Procedure provides in pertinent part:

> "(e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of

any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule."

Rule 16(a)(3) of the Federal Rules of Criminal Procedure provides:

"(a) *Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . recorded testimony of the defendant before a grand jury."

STATEMENT

The court below has refused to pass upon a district court's order requiring wholesale disclosure of secret grand-jury minutes to private litigants not even parties to the proceeding. The appellate court has failed to review the order before it on the ground that the petitioners somehow lack "standing" to contest that disclosure before the trial court, even though they are parties to the proceeding and, in effect, the persons whose secret testimony is to be divulged. The unprecedented actions of the district court and the court of appeals ignore this Court's recent holdings on the scope of standing in the federal courts, and breach the

principle of secrecy that this Court has traditionally maintained for grand-jury proceedings.

This petition arises from a civil action for injunctive relief brought by the United States under the antitrust laws against the petitioners.[1] The complaint was filed in October 1965 in the United States District Court for the District of New Jersey. On the same day and in the same district, an indictment issued in a companion criminal case. In the course of the criminal action, the district court granted each defendant access to certain of the grand-jury testimony of its officers and employees. *United States* v. *American Oil Co.*, 286 F.Supp. 742, 751-53 (D.N.J. 1968). Under the district court's order, the transcripts of 34 witnesses were made available to the defendants; none of the transcripts was reproduced, and the defendants obtained no copies.

In granting limited access to the grand-jury transcripts, the district court relied upon Rule 16(a)(3) of the Federal Rules of Criminal Procedure, which permits a defendant to inspect his grand-jury testimony.[2] The court held that the testimony of each witness to be disclosed was effectively that of his corporate employer by virtue of their "close proximity of relationship" and because the Government would seek to

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[1] The petitioners are the American Oil Company, Atlantic Richfield Company, Cities Service Oil Company, Cities Service Company, Gulf Oil Corporation, Humble Oil & Refining Company, Sinclair Refining Company, and Socony Mobil Oil Campany.

[2] Rule 16(a)(3) provides pertinently:

> "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . recorded testimony of the defendant before a grand jury."

prove its case from the activities of the testifying witnesses. 286 F.Supp. at 753. The criminal action terminated in December 1969, after the defendants pleaded *nolo contendere.*

While the Government's civil and criminal actions were pending, various entities commenced private treble-damage actions against the petitioners. Although some of those actions date from 1967, none of the private plaintiffs has bothered to take any depositions—whether of persons whose grand-jury testimony was once made available to a defendant, of other witnesses before the grand jury, or of any other persons.[3]

In August 1971, the Government and the petitioners gave notice of a proposed settlement and consent judgment in the Government's injunction suit. The plaintiffs in the private suits thereupon moved to intervene. Among other things, they sought unfettered access to all the grand-jury testimony amassed in the Government's criminal case. Both the Government and the petitioners opposed the private plaintiffs' applications. Both relied upon the traditional secrecy of grand-jury proceedings, as established by past decisions of this Court and embodied in Rule 6(e) of the Federal Rules of Criminal Procedure.[4] Both agreed that the proper

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[3] The private actions, all pending in the New Jersey federal court, are *City of Philadelphia* v. *The American Oil Co.*, Civ. No. 647-68; *State of New Jersey* v. *The American Oil Co.*, Civ. No. 90-69; *McCloskey & Co.* v. *The American Oil Co.*, Civ. No. 47-70; and *Yellow Cab Company* v. *The American Oil Co.*, Civ. No. 98-70. In addition to the petitioners here, the following corporations are named as defendants in those actions: Chevron Oil Co., Getty Oil Co., Sun Oil Co., and Texaco, Inc.

[4] Rule 6(e) provides pertinently:

"Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be

procedure—developed in the course of the electrical antitrust cases—was for the private plaintiffs to seek discovery from the petitioners in the various private actions through the conventional means provided by the Federal Rules of Civil Procedure, and, in the event those proved unsatisfactory, to apply to the trial court for access to the grand-jury minutes upon a showing of particularized need.

The district court approved the final consent judgment disposing of the Government's suit. And it denied intervention to the private plaintiffs. But it accorded those plaintiffs the status of *"amici curiae."* And it then granted the *"amici"* wholesale disclosure of *all* the grand-jury testimony that the Government had previously made available in the criminal case to *any* of the defendants (App. B, ¶ 3). It apparently so acted on the theory that the mere passage of time since the grand-jury testimony, together with the defendants' prior access to that testimony, somehow established "particularized need" for disclosure to the private plaintiffs.

The petitioners took an expedited appeal to the Court of Appeals for the Third Circuit. That court dismissed the appeal on the ground that the petitioners had lacked standing in the district court to oppose the

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made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

discovery requests of the *"amici."* In so ruling, the appellate court left standing the order of the district court providing for wholesale disclosure of grand-jury testimony to persons who were not even parties to the proceeding, and who had made no showing of particularized need.[5]

REASONS FOR GRANTING THE WRIT

I. THE WHOLESALE DISCLOSURE OF GRAND-JURY TESTIMONY, WITH NO SHOWING OF PARTICULARIZED NEED, VIOLATES PAST DECISIONS OF THIS AND OTHER FEDERAL COURTS

Until the decision below, no court has ever permitted a private plaintiff to pierce the veil of secrecy surrounding grand-jury proceedings merely as a substitute for discovery in his private litigation. In the limited circumstances where courts have permitted the disclosure of grand-jury testimony to third parties, they have done so only on a witness-by-witness basis, and only when the third parties have begun to take civil depositions. The established practice is that inspection of grand-jury testimony of a witness is permitted only upon a showing that the deposition testimony of that witness reveals significant lapses of memory or material discrepancies between the grand-jury and deposition testimony. *E.g., City of Philadelphia* v. *Westinghouse Elec. Corp.,* 210 F. Supp. 486 (E.D. Pa. 1962), *appeal dismissed,* No. 14296 (3d Cir. 1963) (unreported); *Philadelphia Elec. Co.* v. *Anaconda American Brass Co.,* 275 F. Supp. 146 (E.D. Pa. 1967). Since no depositions whatever have commenced here, the private plaintiffs cannot show—and the courts below could not have properly found—*any*

[5] An order of the district court stays disclosure pending final disposition of the present petition.

need for grand-jury disclosure, let alone the *particularized* need required by past decisions of this Court.

1. *This Court has consistently held that proceedings before a grand jury are to be kept secret.* The secrecy of grand-jury proceedings is an historically established policy, designed to protect the grand-jury process itself. Such is the consistent view of this Court, stated over two decades in an unbroken series of decisions. *United States* v. *Johnson,* 319 U.S. 503, 513 (1943) ("indispensable secrecy"); *Costello* v. *United States,* 350 U.S. 359, 362 (1956) ("body of laymen . . . acting in secret"); *United States* v. *Procter & Gamble Co.,* 346 U.S. 677 (1958); *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959); *Dennis* v. *United States,* 384 U.S. 855, 869 (1966).

The need to protect grand-jury secrecy does not end with the return of an indictment, the discharge of the grand jury, or the termination of the criminal proceeding. As the Court wrote in *Pittsburgh Plate Glass Co., supra:*

> "The reasons . . . [for 'a long-established policy' of secrecy] are manifold [citing *Procter & Gamble, supra*] and are compelling when viewed in light of the history and *modus operandi* of the grand jury. . . . To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body." 360 U.S. at 399-400.

2. *The Court has permitted only limited breaches of grand-jury secrecy.* The Court has said:

> "This 'indispensable secrecy of grand jury proceedings,' *United States* v. *Johnson, supra,* at 513, must not be broken except where there is a com-

> pelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity." *Procter & Gamble Co., supra,* at 682.

The "burden . . . is on the [party seeking disclosure] to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy." *Pittsburgh Plate Glass Co., supra,* at 400.

One such showing of "particularized need" is, in effect, codified in Rule 16(a)(3) of the Federal Rules of Criminal Procedure, referred to above. That provision recognizes that fairness to the defendant in a criminal case requires disclosure to him of the testimony he has previously given to the body now charging him with guilt. See generally 1966 Advisory Committee Note to Rule 16.

Apart from the area covered in Rule 16, the opportunities to examine grand-jury testimony are rare. They are particularly rare in civil cases, where the Court has granted access to grand-jury transcripts only for use at trial: to impeach, to refresh recollection, or to test credibility. See *Procter & Gamble Co., supra,* at 683; *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 234 (1940). The Court has expressly disapproved pretrial disclosure solely for discovery purposes—even when convenient or economical for the party seeking it:

> "The relevancy and usefulness of the testimony sought were, of course, sufficiently established. If the grand jury transcript were made available, discovery through depositions, which might involve delay and substantial costs, would be avoided. Yet these showings fall short of proof that without the transcript a defense would be greatly prejudiced or that without reference to it

an injustice would be done . . . [N]o compelling necessity has been shown for the *wholesale* discovery and production of a grand jury transcript under Rule 34 [of the Federal Rules of Civil Procedure]. We hold that a much more particularized, more discrete showing of need is necessary. . . . The court made no such particularized finding of need in case of any one witness. It ordered that the entire transcript be delivered over to the appellees." *Procter & Gamble Co., supra,* at 682-83 (emphasis in original).[6]

3. *Access to grand-jury proceedings for subsequent civil actions is severely limited.* In limited instances,

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[6] The lower federal courts have uniformly followed this rule. See, *e.g., Continental Baking Co.* v. *United States,* 281 F.2d 137, 148 (6th Cir. 1960) ("The requests on behalf of the defendants were for the entire transcript of the witnesses' testimony before the Grand Jury. Such a demand lacks the selectivity called for under the law and is in excess of the particularized need occasioned by the Government's limited use. This practice has been condemned by the Supreme Court as 'wholesale discovery.'"); *City of Philadelphia* v. *Westinghouse Elec. Corp., supra,* at 490 ("Grand Jury transcript should never be opened solely for discovery purposes. The historical reluctance of the Court to open Grand Jury records would outweigh any other considerations where they are sought purely for discovery purposes"); *Application of State of California to Inspect Grand Jury Subpoenas,* 195 F.Supp. 37 (E.D. Pa. 1961) ("[T]he only reasons for disclosure here are the avoidance of expense and additional work, in order to recoup alleged financial losses in the various civil actions for treble damages. These do not outweigh the policy of secrecy"); *In Re Grand Jury Proceedings,* 29 F.R.D. 151 (E.D. Pa. 1961), *aff'd,* 309 F.2d 440 (3d Cir. 1962) (access to grand-jury testimony by Federal Trade Commission denied); see also *In Re April 1956 Term Grand Jury,* 239 F.2d 263, 271 (7th Cir. 1956), *cert. denied sub nom. Shotwell Mfg. Co.* v. *United States,* 352 U.S. 998 (1957) ("The idea that information obtained from the perusal of material in the possession of a grand jury may be used for the purpose of a civil proceeding is in direct conflict with the policy of secrecy of grand jury proceedings").

federal courts have permitted the disclosure of grand-jury testimony to third parties for use in pretrial discovery in private treble-damage actions. But they have done so only on a witness-by-witness basis, only after depositions have commenced, and only after the party seeking disclosure has shown a "particularized need" based on the actual state of those depositions. The established rule is that inspection of a witness' grand-jury testimony will be permitted solely upon a showing that the witness' deposition testimony reveals significant lapses of memory or material discrepancies between his grand-jury and deposition testimony.

The leading case is *City of Philadelphia* v. *Westinghouse Elec. Corp., supra.* There, Judge Clary held that disclosure of grand-jury testimony could be made only upon a particularized showing of compelling need after an *in camera* examination by the Court. The Court wrote (210 F. Supp. at 489, 491):

> "The Supreme Court has quite clearly stated in *United States* v. *Procter & Gamble Co., supra,* 356 U.S., at 682-683, . . . that the policy of secrecy accorded to Grand Jury Proceedings can only be outweighed by this countervailing policy upon the showing of a particular need, compelling necessity, or that the ends of justice require it. This position was reemphasized in *Pittsburgh Plate Glass Co.* v. *United States, supra. These cases have been equally clear in deciding that relevancy and usefulness of the testimony are not enough to satisfy these standards of necessity and justice. United States* v. *Procter & Gamble Co., supra,* 356 U.S. at 682-83 . . . *Pittsburgh Plate Glass Co.* v. *United States, supra,* 360 U.S. at 400 . . . .
>
> *"If relevancy and usefulness were the only factors of need in plaintiffs' case, this motion would have to be denied."* (Emphasis supplied.)

* * * * * * * * *

> "If, at the completion of any deposition . . ., a motion is made for the production of that witness' Grand Jury testimony, and if the deposition Judge requests it from this Court for examination in camera, the testimony will be immediately made available to him. The deposition Judge may then contrast the Grand Jury testimony with the deposition and determine, in his own discretion, whether in the interest of justice there is compelling need for disclosure."

Judge Clary's procedure has been uniformly adhered to by other federal courts. See, *e.g., Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce,* 323 F. 2d 233 (5th Cir. 1963); *Atlantic City Elec. Co.* v. *A. B. Chance Co.,* 313 F. 2d 431 (2d Cir. 1963), *petn. for stay pending cert. denied,* 83 S. Ct. 964 (1963) (Harlan, Cir. J.); *Consolidated Edison Co.* v. *Allis-Chalmers Mfg. Co.,* 217 F. Supp. 36 (S.D.N.Y. 1963); *Philadelphia Elec. Co.* v. *Anaconda American Brass Co., supra,* at 149.

4 *The private plaintiff is not relieved of his burden of proving "particularized need" simply because the grand-jury transcripts he seeks have previously been disclosed to the defendant.* The petitioners were permitted to inspect the grand-jury testimony of their respective officers and employees in the course of the criminal proceeding against them. They were accorded that right by express provision of the Federal Rules of Criminal Procedure. But that fact does not relieve unrelated private parties from the requirement that they make their own showing of "particularized need" to obtain their own inspection of that testimony. See *Hancock Bros.* v. *Jones,* 293 F. Supp. 1229 (N.D. Calif. 1968).

The holding of the District Court means, in effect, that once the criminal defendant obtains access to his own grand-jury testimony under Rule 16, it auto-

matically becomes available to adversaries in subsequent civil actions—at least where those actions may be protracted. That holding puts a possibly incalculable price tag on the criminal defendant's exercise of the rights granted him under Rule 16; it curtails the effectiveness of those rights and undercuts the policy the Rule seeks to implement; it trenches on the authority of Rule 16(e), as to which the 1966 Advisory Committee has cautioned: "Control of the abuses of discovery [civil as well as criminal] is necessary if [discovery] . . . is to be expanded in the fashion proposed in subdivision (a) . . . ." See *Hancock Bros.* v. *Jones, supra.*

5. *The courts below have effectively abolished the "particularized need" requirement.* In this case the district court purported to apply the "particularized need" requirement to the discovery motion of the private plaintiffs. But it found that requirement satisfied by factors that are bound to be present in virtually every complex antitrust litigation: (1) the lapse of time since the grand-jury testimony, and (2) the petitioners' prior access to the grand-jury transcripts now sought by the private plaintiffs. Neither of those factors should suffice.

Except for the decision below, no court has ever held that the mere lapse of time—"substantial" or otherwise—can establish a "particularized need" for grand-jury transcripts. The requisite need must be shown on a witness-by-witness basis, after depositions have commenced. The party seeking disclosure is required to make a particularized demonstration, based upon the deposition testimony of the witness in question. The *substance* of that testimony—not the time elapsed between its taking and that of the witness's

prior grand-jury testimony—is the sole relevant consideration.

If a mere lapse of time is enough to show "particularized need," there will hardly ever be another case in which the showing cannot be made. Antitrust litigations by the Government, followed by civil actions, are often protracted proceedings. Almost always a considerable time will elapse between grand-jury proceedings and the litigation of subsequent treble-damage actions.

The private plaintiff in treble-damage actions sustains no prejudice by enforcement of the "particularized need" requirement. If he can show, after depositions have commenced and on a witness-by-witness basis, that he needs earlier grand-jury testimony, the cases permit disclosure of that testimony. But the cases do *not* permit the disclosure of grand-jury testimony as a handy pre-deposition discovery device simply because a long time has passed between grand jury and deposition testimony.

Nor can the "particularized need" requirement be satisfied on the simple basis that the petitioners have had access to transcripts of their grand-jury testimony to prepare their defense in the criminal action. Under Rule 16(a)(3), virtually every criminal defendant can—and should—see his own grand jury testimony.

II. THE HOLDING THAT THE PETITIONERS LACKED STANDING BEFORE THE DISTRICT COURT TO CONTEST THE PRIVATE PLAINTIFFS' APPLICATION IS ERRONEOUS AND DEPARTS FROM NUMEROUS DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS

Contrary to the thinking of the court of appeals, the petitioners clearly had standing before the district court to object to the private plaintiffs' application for disclosure, as other federal courts have frequently

held. The petitioners are parties to the action—which is more than the private plaintiffs can say. The testimony in dispute is, effectively, that of the petitioners. Disclosure of that testimony will adversely affect the petitioners, both because the private plaintiffs will seek to use it against them in the private actions and because it will retroactively penalize the petitioners for the exercise of their Rule 16 rights. Finally, there can be no question that the petitioners will vigorously present the issues required for proper resolution of the discovery issue by the federal courts.

1. *The petitioners are adversely affected by the order of disclosure.* The petitioners have a privilege, recognized in law, to avoid the disclosure not only of their own testimony, but of *all* testimony before the grand jury concerning them. *Doe* v. *Rosenberry,* 255 F.2d 118, 119 (2d Cir. 1958) (L. Hand, J.). That privilege reflects the petitioners' practical interest in avoiding indiscriminate disclosure of their grand-jury testimony. The private plaintiffs are interested in gaining whatever advantage they may obtain, both in discovery and at trial; the petitioners are directly and immediately affected by the private plaintiffs' efforts in that direction.

Moreover, the private plaintiffs seek to draw upon material that the grand jury has obtained by unique procedures, not subject to cross-examination or evidentiary safeguards, and for a specific, limited purpose—the lodging of criminal charges. The use of that material in a civil proceeding poses an immediate risk of unfairness to the civil defendants. Civil discovery is otherwise bounded by carefully refined rules, developed to protect both sides in the litigation. But opening up the grand jury investigation as an adjunct

to the plaintiffs' discovery threatens to overturn the balance struck by the civil rules.

At this juncture, the parties most directly affected by any proposed disclosure are those subjected to the inquisition that is sought to be exposed—the petitioners here. Whatever the proper disposition of the discovery controversies on the merits, there can be no doubt of the petitioners' interest in having an opportunity to be heard before those controversies are judicially resolved.

Under recent decisions of this Court, that interest, without more, satisfies the "standing" requirements both of the Constitution and of the pertinent Federal Rules of Criminal Procedure. As the Court said in *Sierra Club* v. *Morton,* — U.S. —, 40 U.S.L.W. 4397 (Apr. 19, 1972), the question is whether the party "is himself adversely affected . . . ." *Id.* at —, 40 U.S.L.W. at 4399. That adverse effect arises from "injury in fact, economic or otherwise," *Ass'n of Data Processing Organizations, Inc.* v. *Camp,* 397 U.S. 150, 152 (1970)—injury that is undeniably threatened here. Once that injury is perceived, the sole remaining question, so far as standing is concerned, is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected *or regulated* by the statute or constitutional guarantee in question." *Id.* at 153 (emphasis supplied). The "statutes" here at issue—Rules 6 and 16 of the Federal Rules of Criminal Procedure—clearly regulate the scope of grand-jury disclosure.

2. *The decision below departs from the settled course of precedent in the lower federal courts.* The courts have routinely accorded "standing" to the civil defendant to challenge the disclosure of his grand-jury

testimony to private parties. The courts have done so where the defendant as a party in the civil action is confronted with a motion to obtain grand-jury testimony of which he has a record, *City of Philadelphia* v. *Westinghouse Elec. Corp., supra,* at 487, or of which he has obtained a summary prepared by his attorneys, *Philadelphia Elec. Co.* v. *Anaconda American Brass Co., supra,* at 147. The result does not differ where the defendant in the civil case has never seen his grand-jury testimony, and the plaintiff seeks its production from the third-party custodian in the course of his civil action. *E.g., Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce, supra* (district court sitting as special master in electrical antitrust cases held grand-jury testimony pursuant to order in *City of Philadelphia* v. *Westinghouse Elec. Corp., supra*); *Atlantic City Elec. Co.* v. *A. B. Chance Co., supra* (same; appeal and mandamus with respect to order directing disclosure denied as interlocutory and for want of abuse of discretion by special master); *Consolidated Edison Co.* v. *Allis-Chalmers Mfg. Co., supra.*

The defendant still has standing where the private plaintiff somehow manages to present his demand for the grand-jury testimony in a forum other than his own civil case. Thus, in *In re Grand Jury Proceedings,* 29 F.R.D. 151 (E.D. Pa. 1961), the Federal Trade Commission moved in a miscellaneous proceeding for an order to permit inspection and copying of grand-jury testimony. The court denied the motion. And the defendants—who were not even parties in the miscellaneous matter—"appeared, argued and filed briefs in opposition to the petition, both on behalf of the corporations and their respective employees. . . ." *Id.* at 152-53. A similar result obtained in *Application of State of California to Inspect Grand Jury Subpoenas,*

195 F.Supp. 37 (E.D. Pa.), where the State sought leave—unsuccessfully—to inspect and copy grand-jury transcripts by a motion filed in a miscellaneous proceeding. Indeed, in *In re Bullock,* 103 F.Supp. 639 (D.D.C. 1952), in response to efforts of the District Commissioners to obtain access to grand-jury minutes of an investigation of a police inspector, the respondent was first afforded an opportunity to give his voluntary consent and then failing that to file an answer to the petition and to be heard in opposition thereto —with respect not to his own testimony, but to the grand-jury proceeding as a whole.[7]

The defendant's standing does not suddenly disappear when the private plaintiff interjects his demand for grand-jury testimony in the civil proceeding brought by the Government rather than in his own action. Thus, in *United States* v. *General Elec. Co.,* 209 F.Supp. 197 (E.D. Pa. 1962), where the Government instituted damage actions following a grand-jury investigation, the defendants were permitted as a matter of course—and successfully—to oppose the effort

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[7] In *United States* v. *Interstate Dress Carriers, Inc.,* 280 F.2d 52 (2d Cir. 1960), the Government sought leave of the district court to turn over the trucking company's documents subpoenaed by the grand jury to the Interstate Commerce Commission, which sought them for its own investigation and had independent authority to get them from the company. The company opposed the application before the district court and prosecuted an appeal from that court's disclosure order. The court of appeals affirmed the order—and confirmed the appellant's standing—by noting that "[d]ocuments produced pursuant to a grand jury subpoena remain the property of the person producing them, . . . and their inspection by persons other than the grand jury and the prosecuting attorneys is therefore dependent on the consent of the owner or upon a Court order." 280 F.2d at 54. For standing purposes, the "proprietary" justification advanced by the court of appeals should not obscure the functional identity of documents and oral testimony. See *In re Petroleum Industry Investigation,* 152 F. Supp. 646 (E.D. Va. 1957).

of the Tennessee Valley Authority to secure access to the grand-jury minutes. *Id.* at 202.

In this very case, the district court—which correctly raised no question of the petitioners' standing to oppose the private plaintiffs' application—recognized the principle at stake. It provided, in another portion of its order, that with respect to the private plaintiffs' requests to examine documents obtained by the Government in its criminal proceeding from third persons other than the defendants, those persons should be given notice of the requests and an opportunity to object to disclosure by written notice and motion filed with the court (App. B, ¶ 2).[8]

The logic supporting the unquestioned recognition of standing in these diverse situations is clear. No matter what the procedural context, "in the case of an attempted disclosure of grand jury testimony, the interests at stake are not only *those of the parties,* or of the custodian, *or of the grand jury witness who is called upon to testify,* but also of the general public. . . ." *Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce, supra,* at 243 (Cameron, J., dissenting) (emphasis supplied).[9] As Judge Weinfeld has written in an analo-

[8] The district court's order in this regard parallels settled administrative policy as approved by the lower federal courts. For example, in *In re Four Seasons Securities Laws Litigation,* 54 F.R.D. 527, 530-31 (W.D. Okla. 1972), Judge Thomsen, sitting by designation, followed the regulatory procedure of the Securities and Exchange Commission that when discovery is sought in civil litigation of transcripts of testimony in a Commission investigation, the person who gave the testimony should be heard by the court if he opposes discovery.

[9] This Court traditionally declines to reject consideration of the merits of questions of major public importance where the impact of the challenged order on the party before it is neither remote nor speculative. There is no question that the petitioners can ably and fully present the issues here raised for the Court's plenary consideration. See *Flast* v. *Cohen,* 392 U.S. 83, 99 (1968); *Baker* v. *Carr,* 369 U.S. 186, 204 (1962).

gous context, "Under the circumstances it is clear that [the petitioners] . . . have an important stake in the present application and are directly concerned with its outcome." *In re United States Electrical Radio & Machine Workers of America,* 111 F.Supp. 858, 862 (S.D. N.Y. 1953) (unions and officers petitioned to suppress grand-jury "presentment").[10]

3. *If anyone lacks standing in this proceeding, it is the private plaintiffs.* The private plaintiffs have never been made parties to the proceeding, either in the district court, the court below, or—so far—in this Court. The district court conferred on them only the status of *"amici,"* and the court of appeals in its *per curiam* opinion pointedly referred to them as "appellees"—in quotation marks. The private plaintiffs have never explained their failure to pursue the remedies properly afforded them by the Federal Rules of Civil Procedure in their own private actions. And no court has explained the basis—if any—upon which grand-jury testimony may be directed to be disclosed to persons not even parties to the proceeding before the court.

[10] Apart from the "standing" issue "in the strict legal sense," the federal court has special supervisory responsibilities with respect to the grand jury. The court may properly consider grand-jury matters by "choos[ing] to hear those who have raised . . . questions because they have shown that . . . alleged violations have injured them"; it is the court's "responsibility, since the matter has finally come to [it] . . . ." *In re United Electrical Radio & Machine Workers of America, supra.*

CONCLUSION

For the foregoing reasons, the petitioners pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

SIMON H. RIFKIND
Attorney for Petitioners,
Office and P.O. Address
345 Park Avenue
New York, N. Y. 10022
212-935-8000

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

JAY GREENFIELD
Of Counsel

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Caption Omitted]

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued January 18, 1972

Before SEITZ, *Chief Judge*, ROSEN, *Circuit Judge*, and STAPLETON, *District Judge*

Opinion of the Court

(Filed March 16, 1972)

PER CURIAM :

The government brought criminal antitrust charges against the defendants in the New Jersey district court. On defendants' motion the grand jury testimony of certain of defendants' employees was produced by the government. The government also brought in the same district court a civil antitrust action for an injunction against the defendants. Prior to the entry of the final consent decree in the government's civil action, plaintiffs in a private antitrust action against the defendants pending in the same district sought leave to intervene. Their purpose was to move for the production by the government of the grand jury materials produced for the defendants in the criminal case. The defendants opposed the application whereas the government did not oppose limited production.

After the entry of the consent decree in the government's civil action the district court denied intervention but, apparently on its own motion, permitted the petitioners to appear as amici and granted production to them in that capacity.

The defendants in the government's civil action appeal. Their right to do so is challenged by the amici, the "appellees," on the ground that (1) the order for production is not an appealable order and (2) the defendants lacked standing in the district court to oppose the application.

We think the appealability issue is not free from substantial doubt. However, we entertain no such doubt as to the standing issue. When the order was entered in this action the grand jury proceedings involved had terminated. Also final judgment had been granted in the criminal proceedings and a consent final decree entered in the government's civil action. Furthermore, the order to produce was not directed to the defendants. In these circumstances at least, we fail to see how the defendants had standing to oppose the application. The government's right in such a situation is not before us.

We therefore conclude that defendants' appeal should be dismissed for lack of standing to oppose the application in the district court. Consequently, it is not necessary for us to determine the propriety of the district court's action in granting discovery to an amicus.

The appeal will be dismissed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Caption Omitted]

Impounding Order and Order Permitting Inspection of Documents

AND Now, this 15th day of October, 1971, upon the application of the plaintiffs in Civil Nos. 647-68, 90-69, 47-70 and 98-70, treble damage actions now pending in this Court, and after consideration of the memoranda of law filed by those plaintiffs and by all the parties in this action, the oral arguments of counsel on August 12 and 30, 1971, and all other papers and proceedings had herein:

IT IS ORDERED:

1. That all of the documents in the possession of the Government pertaining to the above case or the companion case Cr. 153-65, as set forth more fully in Categories A through J of the Attachment hereto, be and they hereby are impounded until further order of this Court, in the custody of the Antitrust Division, U. S. Department of Justice, at 26 Federal Plaza, New York, New York, in the care of such Department attorneys as the Department shall designate in writing; provided that such attorneys may remove said documents to any other office of the Department of Justice upon written notice to the Court and to counsel in the treble damage actions referred to herein, describing the documents to be removed and the office to which they are being removed.

2. That the documents specified in Categories A, B, C, D (including also documents voluntarily submitted by third parties, such parties not considered to be confidential informants by the Government) and F of the Attachment hereto shall be made available for inspection and copying by parties in the following treble damage actions pending

in this Court, Civil Nos. 647-68, 90-69, 47-70 and 98-70, upon reasonable notice to Government attorneys during normal working hours; provided however that if the Government desires to afford any third party (other than defendants) the opportunity to oppose inspection of documents obtained from such third party the Government shall give immediate notice to such third party who may apply to this Court by written notice and motion filed no later than 21 days following the date of entry of this Order for an opportunity to be heard if it so desires, in opposition to inspection. The Department shall furnish to the parties in the treble damage actions a description of the documents of the third party which will be the subject of the hearing.

3. That the Government shall make available for inspection and copying by parties in the aforesaid treble damage actions those Grand Jury transcripts (within Category H of the Attachment) which have heretofore been made available for inspection and copying by any defendant in this case or the companion case Cr. 153-65, plaintiffs in the treble damage actions having shown a particularized need therefor. The motion of the treble damage plaintiffs to inspect the remaining Grand Jury transcripts is denied, without prejudice to their right to reapply upon a showing of particularized need.

4. That the Government shall provide to the parties in the above-designated treble damage actions a list of the names and, to the extent known, the business and residential addresses of each witness who testified before the Grand Jury referred to above.

5. That treble damage plaintiffs have withdrawn their request for inspection of the documents specified in Categories E and G without prejudice to their right to renew the request upon notice to all parties. The Government will make available to the treble damage parties for inspection all documents, lists and other information submitted to defendant The American Oil Company pursuant to para-

graphs 8 and 11 of the Pretrial Order entered in Cr. 153-65 on October 14, 1969.

6. That the motion of treble damage plaintiffs to inspect the documents specified in Categories I and J of the Attachment is denied.

7. That any person whose documents are impounded under this Order shall have access to such documents under proper supervision upon reasonable notice, at an office of the Department of Justice, during normal working hours.

8. All information revealed by the documents shall be accorded confidential treatment. Any such documents or information revealed under this Order to the treble damage parties or any other person assisting in the prosecution or defense of those treble damage actions shall not be revealed by them to any other person, or used, except in the prosecution or defense of those treble damage actions. Nothing contained herein shall preclude the use of any documents or such information in the course of depositions, pre-trial and trial proceedings in the aforesaid treble damage actions.

/s/ ANTHONY T. AUGELLI
U.S.D.J.

DATED: 10/15/71

Attachment

United States v. *The American Oil Company, et al.*

GENERAL CATEGORIES OF DOCUMENTS PERTAINING TO THIS CASE IN THE POSSESSION OF THE GOVERNMENT

A. Documents submitted by Defendants pursuant to subpoena.

B. Documents submitted by third parties pursuant to subpoena.

C. Documents submitted by Defendants pursuant to a written request (e.g., gasoline sales figures).

D. Documents submitted by third parties pursuant to written request (gasoline sales figures, N.J., Pa., Del.).

E. Memoranda of interviews (not verbatim, memorialized after the fact).

1. Interviews conducted by the F.B.I.

2. Interviews conducted by the Staff of the Antitrust Division.

F. Affidavit (one, received from treble damage plaintiff).

G. Correspondence—routine general correspondence (e.g., covering letters from counsel).

H. Grand Jury Transcripts.

I. Internal memoranda (from one attorney in the Antitrust Division to another attorney in the Antitrust Division).

J. Attorney's Notes (the individual notes of the staff attorneys in preparation of the criminal case for trial).

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SUPPLEMENTARY STATEMENT OF JURISDICTION AND OF THE CASE.

This Brief is filed on behalf of the plaintiffs, intervenor-plaintiffs, and class members in *City of Philadelphia v. The American Oil Company, et al.*, Civ. No. 647-68 (D. N. J.), *State of New Jersey v. The American Oil Company, et al.*, Civ. No. 90-69 (D. N. J.), and *McCloskey & Company, Inc. v. The American Oil Company, et al.*, Civ. No. 47-70 (D. N. J.), including, the states of New Jersey and Delaware, and the Commonwealth of Pennsylvania. The complaints in those actions allege price fixing and other antitrust violations related to the acts and violations alleged in *United States v. The American Oil Company, et al.*, Crim. No. 153-65 (D. N. J.), a criminal action in which the petitioners pleaded nolo contendere, and related to the acts and violations that were alleged in the companion civil action, *United States v. The American Oil Company, et al.*, Civ. No. 370-65 (D. N. J.).

The petitioners ask the Court to reconsider the law on standing, the law on the appealability of interlocutory orders, and questions of discovery involved in the limited disclosure to the respondents of grand jury testimony previously examined by petitioners themselves in the course of the criminal action.

The Opinion of the United States Court of Appeals for the Third Circuit, filed March 16, 1972, and set forth as Appendix A to the Petition for a Writ of Certiorari, states in material part that:

> "We think the appealability issue is not free from substantial doubt. However, we entertain no such doubt as to the standing issue. When the order was entered in this action the Grand Jury proceedings involved had terminated. Also final judgment had been granted in the criminal proceedings and a consent final decree entered in the government's civil action.

> Furthermore, the order to produce was not directed to the defendants. In these circumstances at least, we fail to see how the defendants had standing to oppose the application. The government's right in such a situation is not before us."

The petitioners' motion for a rehearing was denied by the Court of Appeals in an Order dated April 18, 1972, as follows:

> "The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied."

The Order of the District Court complained of by the petitioners was entered in the Government civil action, *United States v. The American Oil Company, et al.* The Orders of March 16 and April 18, 1972, of the United States Court of Appeals for the Third Circuit complained of, and relied upon for purposes of jurisdiction in the Petition for Certiorari were entered in that action. The Petition itself is, however, captioned solely in the action of the *City of Philadelphia, et al. v. The American Oil Company, et al.* in which none of the above orders was entered.

ARGUMENT.

I. Jurisdiction.

The Writ should be denied because the Petition has not been filed in *United States v. The American Oil Company, et al.*, the action in which the appeal below was taken and in which the orders alleged to vest jurisdiction in this Court were entered.

II. Standing.

The Order permitting disclosure of those grand jury transcripts which had been examined by the petitioners was addressed to the Department of Justice, which did not appeal from the Order. The grand jury transcripts in question, containing testimony of petitioners' present and past employees, are in the hands of the Government. In short, the petitioners are not compelled to take any action and their property is not involved.

In arguing that they have standing to appeal from an order not directed to them, petitioners ignore the distinction between standing for that purpose and the standing necessary to bring certain forms of original actions. No one may appeal from a judgment unless he has an interest therein that is direct, immediate and substantial. *Mayer v. National Missile and Electronics, Inc.*, 326 F. 2d 401 (9th Cir. 1964); *In re Michigan-Ohio Building Corporation*, 117 F. 2d 191, 193 (7th Cir. 1941). Even a party to an action may not appeal when he has no appealable interest in the order in question. *Webb v. Beverly Hills Federal Savings & Loan Assn.*, 364 F. 2d 145 (9th Cir. 1966); *United States v. Adamant Co.*, 197 F. 2d 1, 4-5 (9th Cir.), cert. denied sub nom., *Bullen v. Scoville*, 344 U. S. 903 (1952); *Milgram v. Loew's, Inc.*, 192 F. 2d 579, 586 (3d Cir. 1951), cert. denied, 343 U. S. 929 (1952);

Missouri Pacific R. Co. v. Thompson, 134 F. 2d 139, 141 (8th Cir.), cert. denied, 320 U. S. 806 (1943); *In re Western Pacific R. Co.*, 122 F. 2d 807 (9th Cir. 1941); *Atles v. United States*, 50 F. 2d 808, 810 (3d Cir. 1931).

In analogous circumstances a defendant in a criminal case is not in a position to challenge the unconstitutional seizure of documents belonging to a third party. *Alderman v. United States*, 394 U. S. 165 (1969); *United States v. Granello*, 365 F. 2d 990, 996 (2d Cir. 1966), cert. denied, 386 U. S. 1019, reh. denied 387 U. S. 949 (1967).

Even under the decisions cited by petitioners relating to the bringing of an original action, petitioners lack standing. It is evident that the only interest alleged by petitioners in support of their standing lies in preventing the use at trial of information derived from the grand jury transcripts. The Order of the United States District Court, entered October 15, 1971, and printed as Appendix B to the Petition, provides:

> "All information revealed by the documents shall be accorded confidential treatment. Any such documents or information revealed under this Order to the treble damage parties or any other person assisting in the prosecution or defense of those treble damage actions shall not be revealed by them to any other person, or used, except in the prosecution or defense of those treble damage actions."

Petitioners, therefore, have no presently cognizable interest in preventing inspection. At very least, until the case proceeds to trial, and the plaintiffs offer in evidence information derived from the transcripts, the petitioners do not have a sufficiently direct and immediate interest to support standing. They will not be injured by the inspection, as opposed to use at trial, of the grand jury transcripts.

The Court in *Sierra Club v. Morton,* — U. S. —, 31 L. Ed. 2d 636 (1972), cited by petitioners, recently reiterated that "injury in fact" is required for standing, and that the relevant inquiry is whether the party "is himself adversely affected". The Court, in dismissing the action, held that ". . . broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must have himself suffered an injury." Absent statutory expansion, orders to inspect are not appealable, where there will be adequate opportunity to challenge any attempted use of the testimony at trial. See *Lawn v. United States,* 355 U. S. 339, 350, reh. denied 355 U. S. 967 (1958).

The decision of the Court of Appeals in this case is not a novel one. Almost a decade ago in the electrical equipment antitrust actions, it was held that corporate defendants lack standing to challenge an Order releasing grand jury transcripts. *Nairn v. Clary,* 312 F. 2d 748, reh. denied, 312 F. 2d 748 (3d Cir. 1963).

This Court in *Donaldson v. United States,* 400 U. S. 517 (1971) held that a taxpayer under investigation by the Internal Revenue Service has no right to object to a summons issued to his employer and accountant to produce records relating to him. The Court stated:

> "Each of the summonses here, we repeat, was directed to a third person with respect to whom no established legal privilege, such as that of attorney and client, exists, and had to do with records in which the taxpayer has no proprietary interest of any kind, which are owned by the third person, which are in his hands, and which relate to the third person's business transactions with the taxpayer." 400 U. S. at 523.

The Court recognized that the taxpayer's only interest lay in the fact that those records presumably contained

details of significance for federal income tax liability, 400 U. S. at 530, 531, just as the only interest of the petitioners herein in the grand jury transcripts lies in the possibility that they contain information relating to their antitrust liability. The transcripts in this case, like the records in *Donaldson*, are not the property of petitioners, nor was the District Court Order directed to petitioners. The mere desire in and of itself to keep such information from the knowledge of the plaintiffs does not give rise to an appealable interest. The Court of Appeals in the present case found the issue free from substantial doubt.

III. Interlocutory Appealability.

The Court of Appeals also questioned the interlocutory appealability of the District Court's Order, although it did not decide that issue.

Respondents could have moved in their own actions, pending before the same District Court, for an Order requiring the United States Government, as a third party, to produce the transcripts which are the subject of dispute. *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 32 F. R. D. 473, 477 (N. D. Ill. 1962). A discovery Order entered in the pending treble damage actions would be interlocutory and unquestionably not subject to immediate appeal. E.g., *Carroll v. United States*, 354 U. S. 394 (1957); *Thomas French & Sons, Ltd. v. International Braid Co.*, 146 F. 2d 735 (1st Cir. 1945); *Bank Line Ltd. v. United States*, 163 F. 2d 133 (2d Cir. 1947); *Wainwright v. Borden*, 368 F. 2d 1000 (5th Cir. 1966); *Borden Co. v. Sylk*, 410 F. 2d 843 (3d Cir. 1969).

The District Court's Order expressly provides that the documents to be inspected, including the Grand Jury transcripts, can be used only in the prosecution or defense of the pending treble damage actions. The only interest

the petitioners have been able to invoke involves not the outcome of the government suit, but the outcome of the private actions.[1] A holding that because the District Court Order was captioned in the context of the United States civil action, rather than in the pending treble damage actions, its status as incident to the treble damage actions is altered, would elevate form over substance.

The Court, in a series of cases, has held that orders entered in collateral, ancillary, or incidental proceedings are not to be invested with "finality" if they relate to another pending proceeding. *Alexander v. United States,* 201 U. S. 117 (1906); *Webster, Cole & Coke Company v. Cassett,* 207 U. S. 181 (1907); *Cobbledick v. United States,* 309 U. S. 323 (1940); *DiBella v. United States,* 369 U. S. 121 (1962). See also, *National Nut Co. of California v. Kelling Nut Co.,* 134 F. 2d 532 (7th Cir. 1943), and *Socony Mobil Oil Co. v. United States,* 275 F. 2d 227 (7th Cir. 1960).

If the treble damage plaintiffs seek to offer the grand jury transcripts in evidence, petitioners will have full opportunity to object. They can thus preserve whatever right they may have to argue that it was error to have granted access for use in the pending cases. Since it is not inspection, but use in court, of the transcripts that could arguably affect the defendants, the validity of inspection should not be decided in an interlocutory and piecemeal appeal.

IV. The District Court's Order Was a Proper Exercise of Its Discretion.

The Court of Appeals did not reach, and respondents will not argue at length, the soundness of the District

1. Indeed, petitioners have filed their Petition for Certiorari in the City of Philadelphia action, rather than in the United States civil action.

Court's discretionary Order on inspection. Setting aside the veil of secrecy with which the Petition has surrounded the relevant facts suffices to establish the soundness of that Order.

It is, for example, repeatedly stated in the Petition that the petitioners were permitted to inspect the Grand Jury transcripts upon a holding that the testimony of an employee is testimony of his employer, and pursuant to Rule 16(a)(3) of the Federal Rules of Criminal Procedure. Petition at pp. 3, 4, 12-15. This is alleged in order to distinguish the position of the petitioners from that of the respondents. In fact, the District Court in ordering disclosure to petitioners in the criminal action grounded its decision upon both Rule 16(a)(3) and upon Rule 6(e), a general disclosure provision. Further, the District Court in its Opinion granting disclosure stated that:

> "It is clear from the cases that a request for disclosure of Grand Jury testimony, either under Rule 6(e) or Rule 16(a)(3), is an appeal to the discretionary powers of the Court. That being the case, this Court can see no reason for becoming entangled in a semantic argument in attempting to determine whether, for purposes of Rule 16(a)(3), there is a conceptual identity between a corporation and its officers and employees." *United States v. The American Oil Company, et al.*, 286 F. Supp. 742, 752 (D. N. J. 1968).

Similarly, it is stated in the Petition that "none of the transcripts were reproduced, and the defendants obtained no copies." Petition at p. 4. But there is a failure to disclose that counsel for the petitioners took and maintained lawyer's notes on the substance of the transcripts they examined. *E.g.*, Transcript of Hearing of August 12, 1971, at p. 53.*

* "Transcript", in this Brief, refers to transcripts in *United States v. American Oil Company, et al.*, Civ. No. 370-65 (D. N. J.).

The petition states that "none of the private plaintiffs has bothered to take any depositions". Petition at p. 5. The petition neglects to reveal that the defendants sought and received, over the objection of the private plaintiffs, a stay of all discovery for over one year in the private actions, pending trial of the criminal action.[2]

It is said that, "Both the Government and the petitioners opposed the private plaintiffs' applications." Petition at pp. 5-6. The Government in fact took no position as to whether particularized need had been shown by the respondents. Thus, during the second hearing on the inspection issue, Mr. Repetto, an attorney for the Department of Justice, stated that:

> "Miss Korman [an attorney for the plaintiffs-respondents] is correct in saying that the government is a disinterested party in terms of the grand jury transcripts. But I can't say that we are an uninterested party. Our position is, as your Honor indicated on August 12, a paragraph similar to the government paragraph 3 submitted at that time, which required a showing of particularized need, would be included in the Order. For that reason we say that we take no position on what that particularized need would be in the circumstances of this case." Transcript of Hearing of August 30, 1971, at p. 53.

The Government similarly declared in a Memorandum submitted to the District Court on August 20, 1971, that: "Since this Court indicated on August 12, 1971 that it would require a showing of particularized need for the inspection of grand jury transcripts, and since that procedure was followed in a previous application to this Court, the Gov-

2. The stay was not vacated until the respondents pleaded nolo contendere prior to trial and almost four years after indictment.

ernment takes no position on what a 'particularized need' would be in the circumstances of this private case . . ." Memorandum at p. 6. The Court of Appeals, in its Opinion of March 16, 1972, printed as Appendix A to the Petition, found that, "The defendants opposed the application whereas the Government did not oppose limited production." Significantly, the Department of Justice did not join in the petitioners' appeal in the Third Circuit.

The most significant omission is in the Petition's description of the grounds of the District Court's decision. It is said that the decision rested solely upon the petitioners' prior access to the transcripts and the "mere" passage of time.[3] Petition at pp. 6, 13, 14.

No reference is made to the sworn affidavits of various witnesses stating that they could not remember their testimony before the grand jury. These were filed by the defendants in the criminal case, and were before the District Court in this case. Typically, these affidavits, dating back to December, 1967, state that the witness had "little specific present recollection" of testimony before the Grand Jury. A representative sample of these affidavits is appended as Exhibit "A".

Counsel for the defendant oil companies also submitted their own affidavits in the criminal action, arguing that "particularized need" justified the disclosure of the grand jury testimony because: the alleged conspiracy covered ten

3. These are not insignificant criteria. The petitioners argued at length in the criminal action in order to secure these transcripts for themselves, that mutuality is the touchstone of fairness, and that the government's possession of the transcripts made inspection by the opposing parties imperative. Similarly, Mr. Topkis, a member of the law firm which prepared the Petition for a Writ of Certiorari, argued in the criminal case that, "Anybody who has not forgotten what happened before the Grand Jury, let alone what happened in 1955, has a most extraordinary memory . . .". *United States v. American Oil Company, et al.*, Crim. No. 153-65, Transcript of Hearing of April 16, 1968, at p. 142.

years, three states and countless transactions; because witnesses would find it difficult to recall what happened given the long passage of time since the grand jury inquiry three and one-half years before and commencement of the alleged conspiracy 13 or more years before [a shorter time lapse than that now facing respondents]; and because it is unfair for the prosecution to have exclusive access to grand jury transcripts, and disclosure is warranted "[i]f the trial of this action is to be a search for the truth . . . and not a sporting event . . . ." An example of one of their affidavits is appended as Exhibit "B".

The witness affidavits formed one of the explicit bases for the decision of the District Court. That Court's decision from the bench, following the second hearing on the grand jury issue, was as follows:

> "A lot of time has elapsed in this case—many, many years. *Some affidavits made by witnesses of the defendants indicate a lapse of memory here or there, or no clear recollection of what happened.* And, in all fairness, it would have to be an extraordinary memory that could recall today what happened years ago.
>
> "In addition to the lapse of time, we have another factor here which I think is important. And that is that those transcripts relating to the minutes of particular employees and officers of the defendants have been seen and made available to the defendants.
>
> "I think—if you combine these two things—lapse of time plus the fact that they have already been seen by the defendants—that makes out, in my opinion, a sufficient reason for making them available also to the treble damage plaintiffs. That's enough particularized need for me." Transcript of Hearing of August 30, 1971, at pp. 180-181. (Emphasis added.)

It is clear that in the context of the facts of this case, the decision of the District Court was sound. See, e.g., *Dennis v. United States*, 384 U. S. 855, 874-75 (1966); *U. S. Industries, Inc. v. United States District Court*, 345 F. 2d 18, 21-23 (9th Cir. 1965); *In re Grand Jury Proceedings*, 4 F. Supp. 283 (E. D. Pa. 1933); *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 194 F. Supp. 763 (D. Mass. 1958); *State of Washington v. American Pipe & Construction Co.*, 41 F. R. D. 59, 63-64 (S. D. Cal. 1966); *State of Illinois v. Harper & Row Publishers, Inc.*, 50 F. R. D. 37, 41 (N. D. Ill. 1969). It is well settled that a motion to inspect grand jury testimony is addressed to the discretion of the trial judge, to be dealt with by him in light of the facts and circumstances of the particular case. *Allis-Chalmers Mfg. Co. v. City of Fort Pierce, Fla.*, 323 F. 2d 233, 242 (5th Cir. 1963); *Atlantic City Electric Company v. A. B. Chance Company*, 313 F. 2d 431, 434 (2d Cir.), stay denied 83 S. Ct. 964 (1963); *In re Grand Jury Proceedings*, 309 F. 2d 440, 444 (3d Cir. 1962). For this reason a determination of the District Court should not be disturbed except "where there has been a manifest abuse of discretion." *Atlantic City Electric Co. v. A. B. Chance, supra.* In this case, where petitioners have already seen the testimony of the witnesses, where seventeen years have passed since the alleged conspiracy began, and where the witnesses themselves submitted affidavits five years ago attesting to their lack of memory, the District Court has not abused its discretion.

CONCLUSION.

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVID BERGER,
1622 Locust Street,
Philadelphia, Penna. 19103
Attorney for City of Philadelphia, et al.

GEORGE F. KUGLER, JR.,
Attorney General,
ELIAS ABELSON,
Assistant Attorney General,
State of New Jersey,
State House Annex,
Trenton, New Jersey 08625

GRANVIL I. SPECKS,
Suite 1130,
208 S. LaSalle St.,
Chicago, Illinois 60604

and

PERRY GOLDBERG,
Suite 1130,
208 S. LaSalle St.,
Chicago, Illinois 60604
Attorneys for State of New Jersey, et al.

HAROLD E. KOHN,
AARON M. FINE,
ARTHUR M. KAPLAN,
1214 IVB Building,
Philadelphia, Penna. 19103

and

SEYMOUR KURLAND,
JUDAH I. LABOVITZ,
12th Floor, Packard Building,
Philadelphia, Penna. 19102
Attorneys for McCloskey & Company, et al.

APPENDIX A.

Witness Affidavits.

(1) Watson Affidavit.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW JERSEY.

CRIMINAL No. 153-65.

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY,
THE ATLANTIC RICHFIELD COMPANY,
CITIES SERVICE OIL COMPANY,
CITIES SERVICE COMPANY,
GULF OIL CORPORATION,
HUMBLE OIL & REFINING COMPANY,
SINCLAIR REFINING COMPANY, and
SOCONY MOBIL OIL COMPANY, INC.,
Defendants.

AFFIDAVIT.

STATE OF NEW YORK
COUNTY OF NEW YORK } *ss.:*

B. S. WATSON, being duly sworn, deposes and says:

1. On February 10, 1964, and July 18, 1964, I testified under subpoena before a grand jury of this Court. I under-

stand that this grand jury subsequently returned an indictment against Cities Service Company ("Cities Service") and others. I make this affidavit in support of a motion by Cities Service for an order permitting its counsel to inspect and copy the transcript of my testimony before the grand jury.

2. I am informed that the indictment covers the period January 1, 1955 through April 8, 1965. During this period, I was a Director of Cities Service and a member of its Executive Committee; from January 1, 1955 until June 25, 1959, I was President of Cities Service; from June 25, 1959 through April 8, 1965, I was Chairman of the Board of Directors of Cities Service; from May 26, 1964 through April 8, 1965, I was also Chairman of Cities Service's Executive Committee. During the period covered by the indictment, I was also an officer and/or director of several subsidiaries of Cities Service. At present, I am a consultant to and an Honorary Director of Cities Service.

3. I have little specific present recollection of my testimony before the grand jury three and a half years ago. I do recall that I was shown several documents and was questioned about many meetings and communications which occurred during the late 1950's and early 1960's. The documents and questions related primarily to sales of gasoline in Pennsylvania and New Jersey.

4. I have no objection to the disclosure of the record of my testimony to Cities Service's counsel for use in this case. In fact, I request that such disclosure be ordered so that if I should be a witness at the trial of this case, it can be used to refresh my recollection. I make this affidavit voluntarily and without coercion.

/s/ B. S. Watson.
B. S. Watson.

Sworn to before me this 20th day of December, 1967.

/s/ JULIA R. MCGLINCHEY
Notary Public, State of New York
No. 41-7833075 Queens County
Certificate filed in New York County
Term Expires March 30, 1968

(2) Charlton Affidavit.

PRIVILEGED AND CONFIDENTIAL
FOR USE ONLY BY DEFENDANTS' COUNSEL IN THE CAPTIONED ACTION.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

CRIMINAL NO. 153-65.

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY, *et al.*,
Defendants.

AFFIDAVIT.

STATE OF TEXAS
COUNTY OF HARRIS

SAMUEL E. CHARLTON, being duly sworn, deposes and says:

1. I am Vice President in charge of marketing for Humble Oil & Refining Company ("Humble"). I attained that office on December 1, 1963. Prior thereto I was employed in various positions by Humble and its predecessor corporation. On October 20, 1964 I testified under subpoena before a grand jury of this Court. I understand that this grand jury subsequently returned an indictment

against Humble and others. I make this affidavit in support of a motion by Humble for an order permitting its counsel to inspect and copy the transcript of my testimony before the grand jury.

2. I am informed that the indictment covers the period January 1, 1955 through April 8, 1965. During that time I occupied the following positions with Humble and its predecessor corporation:

	Title	*Geographic Location*
1/1/55	Merchandising Mgr.	New Orleans, La.
1/31/55	Spec. Assign. N. Y. Mktg.	New York, N. Y.
3/21/55	Merchandising Mgr.	New Orleans, La.
8/15/55	Spec. Assign., Assisting Northern Region Sales Mgr.	New York, N. Y.
11/21/55	Merchandising Mgr.	New Orleans, La.
1/1/56	Asst. Division Mgr.	Bala-Cynwyd, Pa.
9/1/58	Division Manager (Acting)	Bala-Cynwyd, Pa.
4/16/59	Division Manager	Bala-Cynwyd, Pa.
1961	Asst. Mktg. Mgr., Okla. Pate Area	Chicago, Ill.
1961	Area Marketing Manager	Chicago, Ill.
1962	Region Mktg. Mgr. (Central Region)	Tulsa, Okla.
12/1/63	Vice President—Mktg. (Headquarters)	Houston, Texas

3. I have little specific present recollection of my testimony before the grand jury three years ago. I do recall that I was shown some documents and was questioned about many transactions, communications and events which were alleged to have occurred between 1956 and 1962. The documents and questions related to sales of gasoline in Pennsylvania, New Jersey and Delaware.

4. I have no objection to the disclosure of the transcript of my testimony to Humble's counsel for use in this case. In fact, I request that such disclosure be ordered so that if I should be a witness at the trial of this case, such testimony can be used to refresh my recollection. I make this affidavit voluntarily and without inducement or coercion.

/s/ SAMUEL E. CHARLTON.
Samuel E. Charlton.

Sworn to before me this 21st day of December, 1967.

/s/ NOEL G. BLACK
Notary Public

(3) Logan Affidavit.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Criminal No. 153-65.

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY,
THE ATLANTIC RICHFIELD COMPANY,
CITIES SERVICE OIL COMPANY,
CITIES SERVICE COMPANY,
GULF OIL CORPORATION,
HUMBLE OIL & REFINING COMPANY,
SINCLAIR REFINING COMPANY, AND
SOCONY MOBIL OIL COMPANY, INC.,
Defendants.

AFFIDAVIT.

STATE OF MARYLAND
COUNTY OF BALTIMORE } *ss.:*

E. J. LOGAN, being duly sworn, deposes and says:

1. On November 14, 1963, November 18, 1963, and March 12, 1964, I testified under subpoena before a grand jury of this Court. I understand that this grand jury subsequently returned an indictment against Cities Service

Oil Company ("Cities") and others. I make this affidavit in support of a motion by Cities for an order permitting its counsel to inspect and copy the transcript of my testimony before the grand jury.

2. I am informed that the indictment covers the period January 1, 1955, through April 8, 1965. From 1955 to 1956, I was Marketing Assistant to Cities' Philadelphia Division Manager; from 1956 to 1959, I was Marketing Assistant to the Philadelphia Region Sales Manager; from 1959 to 1964, I was Administrative Assistant to the Philadelphia Region Manager; since 1964, I have been price Manager of the Baltimore Region. I am still employed by Cities.

3. I have little specific present recollection of my testimony before the grand jury three and four years ago. I do recall that I was shown several documents and was questioned about many sales transactions and communications which occurred between 1955 and 1964. The documents and questions related to sales of gasoline in Pennsylvania, New Jersey and Delaware.

4. I have no objection to the disclosure of the record of my testimony to Cities' counsel for use in this case. In fact, I request that such disclosure be ordered so that if I should be a witness at the trial of this case, it can be used to refresh my recollection. I make this affidavit voluntarily and without coercion.

/s/ E. J. Logan
E. J. Logan

Sworn to before me this 15th day of December, 1967.

(Name Illegible)
My Commission Expires July 1, 1968.

(4) Sanborn Affidavit.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Criminal No. 153-65.

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY,
THE ATLANTIC REFINING COMPANY,
CITIES SERVICE OIL COMPANY,
CITIES SERVICE COMPANY,
GULF OIL CORPORATION,
HUMBLE OIL & REFINING COMPANY,
SINCLAIR REFINING COMPANY, AND
SOCONY MOBIL OIL COMPANY, INC.,
Defendants.

AFFIDAVIT.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

ARTHUR R. SANBORN, being duly sworn, deposes and says:

1. On March 30, 1964, I testified under subpoena before a grand jury of this Court. I understand that this grand jury subsequently returned an indictment against The Atlantic Refining Company, (now Atlantic Richfield Company, hereinafter referred to as "Atlantic Richfield") and others. I make this affidavit in support of a motion

by Atlantic Richfield for an order permitting its counsel to inspect and copy the transcript of my testimony before the grand jury.

2. I am informed that the indictment covers the period from January 1, 1955 through April 8, 1965. From July 14, 1952 to September 3, 1956, I was District Manager, Philadelphia Suburban District, for Atlantic Richfield; from September 3, 1956 to September 2, 1957, I was Manager Sales Group, Philadelphia-New Jersey Sales Group, for Atlantic Richfield; from September 2, 1957 to September 15, 1958, I was District Manager, Philadelphia Suburban District, for Atlantic Richfield; from September 15, 1958 to February 1, 1966, I was Commercial Accounts Manager for Atlantic Richfield.

3. I have no specific recollection of my testimony before the grand jury. I do recall that I was questioned about transactions and communications which occurred between 1955 and 1962. The questions related to sales of gasoline in Pennsylvania, New Jersey, and Delaware.

4. I have no objection to the disclosure of the record of my testimony to Atlantic Richfield's counsel for use in this case. In fact, I request that such disclosure be ordered so that if I should be a witness at the trial of this case, it can be used to refresh my recollection. I make this affidavit voluntarily and without coercion.

/s/ ARTHUR R. SANBORN
Arthur R. Sanborn

Sworn to before me this 18th day of December, 1967.

/s/ MARGARET J. MOYER
Notary Public
Philadelphia County
My Commission Expires July 24, 1968

APPENDIX B.

Affidavit of Petitioner's Counsel.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

CRIMINAL NO. 153-65.

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY,
THE ATLANTIC RICHFIELD COMPANY,
CITIES SERVICE OIL COMPANY,
CITIES SERVICE COMPANY,
GULF OIL CORPORATION,
HUMBLE OIL & REFINING COMPANY,
SINCLAIR REFINING COMPANY, AND
MOBIL OIL CORPORATION,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO INSPECT AND COPY GRAND JURY TESTIMONY OF OFFICERS AND EMPLOYEES OF HUMBLE OIL & REFINING COMPANY.

STATE OF NEW YORK
COUNTY OF NEW YORK } *ss.:*

A. DONALD MACKINNON, being duly sworn, says:

1. I am one of the attorneys for defendant Humble Oil & Refining Company (herein "Humble"). I make this

affidavit in support of Humble's motion to permit its attorneys to inspect and copy the grand jury testimony of Humble's witnesses. The affidavits of such witnesses submitted herewith show that each has little recollection of his testimony before the grand jury and has expressed the desire that his testimony be made available to Humble's attorneys engaged in defense of this action. The order sought by the instant motion would permit Humble's attorneys to copy only those portions of the testimony which they believe are needed for Humble's defense of this action.

2. The accompanying memorandum of law submitted by defendants sets forth the reasons why Humble is entitled to the discovery sought under the recent amendments to Rule 16 of the Rules of Criminal Procedure, and also under the "particularized need" standard which the courts have formulated for motions seeking inspection of grand jury testimony under Rule 6(e). In this affidavit, I shall merely outline the pertinent and indisputable facts which relate to this motion.

3. The grand jury which issued the indictment commenced its investigation about October, 1963. It sat for approximately 18 months. Its investigation concerned the marketing of gasoline and other petroleum products between the years 1952 (or earlier) and 1965 in the States of New Jersey, Pennsylvania and Delaware by defendants, several other major oil companies and a large number of distributors and dealers of petroleum products. So far as defendants are apprised, the grand jury did not investigate other matters. The grand jury was apparently preceded by an FBI investigation of the same subject matter.

4. It is my understanding that six Humble witnesses testified before the grand jury under subpoena. I am in-

formed that at least forty-six officers and employees of other defendants also so testified. I do not know how many other witnesses appeared before the grand jury, but I am informed that testimony was given by at least fifteen officers or employees of unindicted alleged co-conspirators and by many other persons as well. I understand that all other defendants produced substantial quantities of documents to the grand jury, as did Humble. In short, the Government has made full use of its powers and resources to conduct a sweeping investigation of the marketing of gasoline in a three-state area over a 13-year period.

5. The indictment alleges violations of the Sherman Act in the States of New Jersey, Pennsylvania and Delaware from January 1, 1955, until April 8, 1965. The Government states in its bill of particulars that it is claiming an implied agreement among defendants and co-conspirators and that it will rely among other things on alleged "acts" of named and unnamed individuals, including the six Humble witnesses who appeared before the grand jury and whose "acts" are alleged to be the "acts" of Humble.

6. By this motion, Humble seeks permission for its counsel to inspect and copy certain grand jury testimony of its witnesses. Each of the six Humble witnesses have informed Humble he can recall his grand jury testimony only in the broadest sense, and, as previously stated, that he desires Humble's attorneys to examine his testimony. (Each of these six men has furnished Humble with an affidavit in which he states that he has little specific recollection of his grand jury testimony and that he is willing to have Humble's counsel inspect his testimony. The affidavits are annexed.)

7. Specifically, this motion seeks the testimony of the following Humble witnesses who testified before the grand jury:

(a) Samuel E. Charlton—Mr. Charlton is presently a Vice President of Humble in charge of Marketing. He has served in that post since 1963. Previously he had served in various other capacities and was, among other places, located in Pennsylvania. He testified before the grand jury on October 26, 1964, and was questioned, among other things, about alleged events which occurred as early as 1956. The bill of particulars sets forth ten "acts" in which Mr. Charlton allegedly participated and for which Humble is claimed to be responsible.

(b) D. F. Dickey—During the period covered by the indictment, Mr. Dickey held several marketing and staff positions in Humble and its predecessor corporation; from 1955 to 1956, he was District Manager; from 1956 to 1957, he was Merchandising Manager. He testified before the grand jury on June 22, 1964. The bill of particulars sets forth four "acts" in which Mr. Dickey allegedly participated and for which Humble is claimed to be responsible.

(c) John R. Probert—During the period covered by the indictment, Mr. Probert held several positions in connection with the New Jersey operations of Humble and its predecessor corporation. In 1958, he was Assistant District Manager; in 1959, he was Assistant Manager (Acting). He testified before the grand jury on December 2, 1963, and was questioned, among other things, about alleged events which occurred as early as 1959. The bill of particulars sets

forth four "acts" in which Mr. Probert allegedly participated and for which Humble is claimed to be responsible.

(d) Albert F. Spangenberg—Throughout the period 1955-1962, Mr. Spangenberg was located in Philadelphia, primarily as District Manager for Humble and its predecessor corporation. In July, 1966, he retired. He testified before the grand jury on June 4, 1964, and was questioned, among other things, about alleged events which occurred as early as 1955. The bill of particulars sets forth seven "acts" in which Mr. Spangenberg allegedly participated and for which Humble is claimed to be responsible.

(e) Beverly W. LaDage—Since 1956, Mr. LaDage has been Assistant District Manager and District Manager in the Wilmington office of Humble and its predecessor corporation. He testified before the grand jury on December 2, 1963, and was questioned, among other things, about events which allegedly occurred as early as 1955. The bill of particulars sets forth nineteen "acts" in which Mr. LaDage allegedly participated and for which Humble is claimed to be responsible.

(f) Edmund J. Fallon—From 1955 to the present, Mr. Fallon has held various marketing positions in the Pennsylvania offices of Humble and its predecessor corporation. He testified before the grand jury on March 30, 1964, and was questioned, among other things, about events which allegedly occurred as early as 1955. The bill of particulars sets forth seven "acts" in which Mr. Fallon allegedly participated and for which Humble is claimed to be responsible.

8. If the trial of this action is to be a search for the truth, as it should be—and not a sporting event in which the prosecution has full and exclusive access to grand jury testimony given by the Humble witnesses—Humble attorneys should be allowed to inspect the testimony of such witnesses and to copy those portions of the testimony which it needs for its defense of the action. The Government claims in its bill of particulars that the "acts" of these six Humble witnesses constitute the "acts" of Humble and help to establish Humble's guilt. In light of the fact that the Government is charging Humble with criminal responsibility for the alleged "acts" of certain of its employees, the testimony of these Humble witnesses must, in fairness, be treated as the testimony of Humble within the meaning of Rule 16(a)(3). (The pertinent provisions of Rule 16 are set out and discussed in defendant's memorandum of law.)

9. As shown in the accompanying memorandum of law, neither the indictment (which this Court has described as a "model of generality") nor the bill of particulars adequately apprises Humble of the substance of the Government's case. Under all the circumstances, it is evident that Humble cannot adequately prepare to defend itself against the charges alleged in this action unless it is permitted to inspect and copy the testimony here moved for. Accordingly, on the basis of the information set out above, and for the reasons given in defendants' memorandum of law, I respectfully submit that the motion should be granted.

/s/ A. Donald MacKinnon.
A. Donald MacKinnon.

Sworn to before me this 4th day of January, 1968.

/s/ RICHARD E. BROOKS
Notary Public

Richard E. Brooks
Notary Public, State of New York
No. 31-514845
Qualified in New York County
Term Expires March 30, 1968

FILE COPY

Supreme Court, U. S.
FILED
AUG 17 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-93

THE AMERICAN OIL COMPANY, *et al.*,
Petitioners,

against

CITY OF PHILADELPHIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS, YELLOW CAB COMPANY OF PHILADELPHIA, *ET AL.*, IN OPPOSITION

JOSEPH CALDEBON, Esq.
DAVID BLASBAND, Esq.
Attorneys for Respondents,
Yellow Cab Company of Philadelphia,
Yellow Cab Co. of Camden, and
Yellow Limousine Service, Inc.
110 East 59th Street
New York, N. Y. 10022

LINDEN AND DEUTSCH
Of Counsel

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IN THE

Supreme Court of the United States

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No. 72-93

THE AMERICAN OIL COMPANY, *et al.*,
Petitioners,

against

CITY OF PHILADELPHIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS, YELLOW CAB COMPANY OF PHILADELPHIA, *ET AL.*, IN OPPOSITION

Questions Presented

Should the Court consider:

1. Whether or not the United States Court of Appeals was correct in its dismissal of the petitioners' appeal on the ground that they lacked standing in the United

States Government civil antitrust action to contest an order requiring the Government to make available certain transcripts of grand jury testimony to the treble damage plaintiffs in another action where (a) the property in question belonged to the Court and not to the defendants in the Government's civil action; (b) the Government civil action had previously terminated by a consent decree and the grand jury proceedings and Government criminal action against the same defendants had long since terminated; and (c) the defendants in the Government civil and criminal actions had previously obtained access to the same grand jury transcripts and had freely disseminated such grand jury testimony among themselves?

2. Whether or not the United States District Court committed a manifest abuse of discretion by entering an order in the United States Government civil action granting plaintiffs and defendants in the treble damage actions access to certain grand jury transcripts where (a) the defendants had previously sought and obtained the same transcripts through court order; (b) the defendants had freely circulated among themselves the contents of the witnesses' testimony before the grand jury; (c) the grand jury proceedings and the Government criminal and civil actions had long since terminated; and (d) the Government did not object to such portion of the order provided particularized need was shown and where the Government expressly stated that it took no position as to what would constitute particularized need in this case? This issue was not determined by the Court of Appeals below.

Preliminary Statement

This brief is submitted on behalf of respondents, YELLOW CAB COMPANY OF PHILADELPHIA, YELLOW CAB CO. OF CAMDEN and YELLOW LIMOUSINE SERVICE, INC., in opposition to the above petition for a writ of certiorari.

The Yellow Cab respondents are plaintiffs in Civil Action No. 98-70, one of the treble damage cases against petitioners herein pending in the United States District Court, District of New Jersey, charging price fixing with respect to gasoline.

As will be set forth more fully later in this brief, there do not exist special or important reasons for the granting of the relief sought by petitioners herein because:

(1) the holding by the United States Circuit Court of Appeals below that petitioners lacked standing before the District Court to contest the private plaintiffs' application is not erroneous nor does it depart from decisions of this Court or other federal courts; and

(2) the decision of the District Court granting private plaintiffs access to certain grand jury testimony does not constitute an abuse of discretion and is in accord with past decisions of this and other federal courts.

At the outset, it should be noted that the petitioners have captioned this proceeding as "The American Oil Company, et al. v. City of Philadelphia, et al." That caption appears to refer to one of the private treble damage

actions pending in the United States District Court for the District of New Jersey. However, the order which is the subject of the present petition was entered in a civil antitrust injunction action brought by the United States Government, captioned "United States of America v. The American Oil Company, et al." Civil Action No. 370-65. The appeal to the United States Court of Appeals for the Third Circuit, to which the instant petition is directed, also bore the caption of the United States civil action.

The first of the private treble damage actions was commenced in November 1967. As a result of the pendency of the United States Government criminal actions, the private actions were suspended for approximately two years. On October 15, 1971, Judge Augelli of the U.S. Distict Court, District of New Jersey, issued the order in the Government civil action which is the subject of the instant petition, granting the plaintiffs in the private treble damage actions access to a portion of the transcripts sought by them of testimony given before the grand jury by employees and former employees of the private defendants. The use of the transcripts was limited to the treble damage actions and the order provided that all information be kept confidential. Judge Augelli denied the treble damage plaintiffs access to those grand jury transcripts which the defendants had not been permitted to inspect during the course of the criminal proceedings.

As set forth more fully below, prior to Judge Augelli's decision, the same transcripts in issue here had been examined by the defendants, and their contents were freely disseminated among all of the treble damage defendants through counsel. Thus, the grand jury transcripts, the secrecy of which petitioners claim should remain inviolate,

have already become the subject of wholesale disclosure as a direct result of petitioners' own acts.

In granting the private plaintiffs access to grand jury transcripts, Judge Augelli made an express finding of particularized need based upon the aforesaid prior disclosure of the grand jury testimony by the defendants, the time that had elapsed since the grand jury proceedings and since the prior events which were the subject of the grand jury testimony, and the failure of the grand jury witnesses to recall either the events or their testimony, which was acknowledged by the witnesses themselves in sworn affidavits.

It has been a year since Judge Augelli entered the order which is the subject of the instant petition. As a result of an unsuccessful appeal to the United States Court of Appeals for the Second Circuit and a motion for reargument of the Court of Appeals decision, which was also denied, plaintiffs still have not obtained access to the transcripts as ordered by Judge Augelli over a year ago. In the interim, discovery has come to a standstill. It is respectfully submitted that there exists no reason to further delay the expeditious disposition of this litigation.

Counter-Statement

There are four private treble damage actions pending in the United States District Court for the District of New Jersey against the eight defendant oil companies, the petitioners herein, and four additional oil companies.*

* The petitioners are The American Oil Company, Atlantic Richfield Company, Cities Service Oil Company, Cities Service Company, Gulf Oil Corporation, Humble Oil and Refining Company, Sinclair Refining Company and Socony Mobil Oil Company. Each of the petitioners are defendants in treble damage actions. In addition, the following corporations are named as defendants in those actions: Chevron Oil Co., Getty Oil Co., Sun Oil Co. and Texaco, Inc.

The first private treble damage action, following civil and criminal antitrust actions instituted by the United States in October 1965, was instituted by the City of Philadelphia in 1967. Subsequently, similar treble damage actions were instituted by the State of New Jersey, McCloskey and Company and Yellow Cab Company of Philadelphia.*

By decision filed on July 13, 1971, Judge Augelli, then Chief Judge of the United States District Court for the District of New Jersey, confirmed three separate classes of plaintiffs in the private treble damage actions. The Yellow Cab respondents were confirmed as representatives of the taxicab-limousine class (*City of Philadelphia* v. *American Oil Company,* CCH Trade Cases ¶73,625 (D.N.J. 1971)). The City of Philadelphia and State of New Jersey were confirmed as representatives of a class of public body purchasers of gasoline and the McCloskey Company was confirmed as representative of the class of non-public purchasers of gasoline in tank wagon quantities.

Subsequently, the Yellow Cab plaintiffs as well as the other plaintiffs in the treble damage actions moved to intervene to oppose the entry of the consent decree with respect to the Government's instant civil action against the petitioners herein. As part of those proceedings, the treble damage plaintiffs sought access to the transcripts of *all* witnesses who had testified before the grand jury. By order entered October 15, 1971, which is the subject of the instant appeal, Judge Augelli granted the treble damage

* The private actions, all pending in the New Jersey federal court, are City of Philadelphia v. The American Oil Co., Civ. No. 647-68; State of New Jersey v. The American Oil Co., Civ. No. 90-69; McCloskey & Co. v. The Amercian Oil Co., Civ. No. 47-70, and Yellow Cab Company v. The American Oil Co., Civ. No. 98-70.

plaintiffs access to certain of the grand jury transcripts, limiting disclosure to those transcripts of thirty-six employees and former employees of the treble damage defendants which had previously been examined by the defendants. The order was directed to the Government, not to the petitioners herein, and was not directed to any property or thing in which the petitioners had any proprietary right. Moreover, Judge Augelli's order was entered well after the grand jury proceedings and the Government's criminal and civil actions had terminated. In its brief dated August 20, 1971, with respect to the application of the treble damage plaintiffs, the Government did not oppose the private plaintiffs' request for access to grand jury transcripts provided that "particularized need" was shown. The Government specifically stated that it "* * * takes no position on what a 'particularized need' would be * * *." The Government has not appealed from Judge Augelli's order.

Prior to the private plaintiffs' motion and during the course of the criminal proceedings, the defendants (petitioners herein) sought an order to permit them to examine the transcripts of testimony of over 50 of their employees and ex-employees who had testified before the grand jury. In support of their motion defendants submitted affidavits of 34 of their employees who stated they could not recall their grand jury testimony. Copies of five such affidavits are annexed hereto as Appendix A. All of the affidavits submitted on behalf of the defendants are substantially identical to the affidavits annexed hereto and have been deleted only because of redundancy.

The Court granted defendants' motion to the extent that it gave defendants access to the identical transcripts which Judge Augelli later made accessible to the parties in the treble damage actions, holding:

> "The Rules pertaining to discovery and disclosure usually leave sufficient latitude in the exercise of discretion to prevent or correct abuses. There remain, no doubt, instances where the ends of Justice require that the secrecy of Grand Jury testimony remain inviolate * * * *no such showing has been made in this case.*" *United States* v. *American Oil Company,* 286 F.Supp. 742 (D. N.J. 1968) [Emphasis added].

Following that decision the defendants inspected all of the transcripts of the testimony of their own employees to which they were given access. In addition, counsel for the defendants had previously conducted interviews of and prepared recall statements for the grand jury witnesses immediately after the latter had given testimony. Thereafter, counsel for the various defendants inspected recall statements of grand jury witnesses employed by the other defendants and made summaries of such recall statements.*

* Various of the defendants acknowledged this free flow of grand jury testimony information in their respective answers to plantiffs' interrogatories in the treble damage actions. For example, in answer to Interrogatory No. 1, Set No. 1, filed in the private treble damage action, defendant Atlantic Richfield stated:

> "(b) During the period covered by this interrogatory the Company did not obtain summaries of any grand jury transcripts; counsel* for the Company did, however, interview the above named witnesses called by the grand jury and prepared recall statements for each such witness; the precise dates of the statements are unknown, but generally the interviews were conducted

Thus, the defendants not only have had access to the grand jury testimony of their own employees and former employees, but, in addition, have detailed knowledge as to testimony of other defendants' employees and former employees. Under the circumstances, it is respectfully submitted that grand jury secrecy is not a consideration in these proceedings.

ARGUMENT

POINT I

The decision of the United States Circuit Court of Appeals below dismissing the appeal by reason of petitioners' lack of standing was correct and does not depart from nor conflict with the decisions of this Court or other federal courts.

In its *per curiam* decision, dismissing petitioners' appeal below, the Court of Appeals held:

"We think the appealability issue is not free from substantial doubt. However, we entertain no such

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on the same day the witness appeared before the grand jury. [Footnote omitted.]

* * *

"(In addition, counsel for certain of the defendants inspected certain of the recall statements of grand jury witnesses employed by other defendants and made summaries thereof. Information responsive to this interrogatory with respect to interviews of individuals employed by other defendants is being furnished by each such defendant. Accordingly, it would be unnecessarily duplicate to attempt to supply such information here.)"

A copy of the foregoing interrogatory answer is annexed as Appendix B.

A substantially similar answer was given by defendant Sinclair Refining Company in its answer to Interrogatory No. 1.

doubt as to the standing issue. When the order was entered in this action the grand jury proceedings involved had terminated. Also final judgment had been granted in the criminal proceedings and a consent final decree entered in the government's civil action. Furthermore, the order to produce was not directed to the defendants. In these circumstances at least, we fail to see how the defendants had standing to oppose the application. The government's right in such a situation is not before us."

It is a basic requirement of standing at any stage of a legal proceeding that the party must have an *interest* in the subject matter of the dispute. As the Court stated in *National Missile and Electronics, Inc.*, 326 F.2d 401 (9th Cir. 1964), quoting from *Hamilton Trust Co.* v. *Cornucopia Mines Co.*, 9th Cir., 223 F. 494:

> "It is a fundamental rule of appellate jurisdiction that every person desiring to appeal from a decree must be interested in the subject-matter of the litigation, and the interest must be immediate and pecuniary and not a remote consequence of the judgment. The interest must be substantial, and a merely nominal party to an action cannot appeal. The interest must also be subsisting, for although a party may have an appealable interest at the commencement of the suit, if that interest has terminated before the entry of the judgment or decree sought to be appealed from, he cannot appeal. Again, the right or title which the appellant seeks to establish must be his own and not that of a third person. * * *" (326 F.2d at page 402)

The petitioners' lack of interest in the subject matter of the order of the District Court below is apparent from the following:

1. The order was not directed against any property of petitioners, nor did it require them to take or refrain from taking any action. Rather, the property in question, grand jury transcripts, belong to the Court. The United States Government, which has the greatest interest in the secrecy of grand jury proceedings, has not appealed from the District Court's decision. Since the defendants have no proprietary interest either in the transcripts themselves or the testimony which was heard by the grand jury, they lack standing in the U.S. Government proceedings to contest an order which would make the property in question available in the treble damage actions. *Donaldson* v. *United States,* 400 U.S. 517 (1971); *Alderman* v. *United States,* 394 U.S. 165 (1969).

2. The order of the District Court does not affect any interest of the petitioners in the Government's civil action in which it was entered, nor in the criminal proceedings against petitioners. The civil action terminated by a consent decree entered August 12, 1971. The grand jury proceedings had long ceased and all of the criminal actions against the petitioners had previously ended by their filing pleas of *nolo contendere.* Thus, any interest that the petitioners may have had in the subject of the order in those proceedings had long since terminated.

3. The sole interest claimed by the petitioners is that of secrecy with respect to testimony given by their employees and former employees before the grand jury. It is clear that this purported interest is not pecuniary; nor is it substantial in view of the fact that the petitioners themselves have already destroyed any secrecy by acquiring and

disseminating among themselves the very testimony which they now seek to suppress.

Petitioners have cited no decisions rendered by this Court or any other court with respect to the issue of standing which conflict with the decision of the Court of Appeals below. In none of the cases involving grand jury disclosure cited by the petitioners in Point II of their brief was the issue of standing raised or decided. In fact, where the issue was raised in a proceeding in which treble damage plaintiffs were granted access to grand jury records, the Court of Appeals held that private defendants lacked standing to contest the disclosure. *Nairn* v. *Clary,* 312 F.2d 748 (3rd Cir. 1963).

Petitioners' reliance on *Sierra Club* v. *Morton,* 40 U.S. L.W. 4397 (Apr. 19, 1972) at page 16 of their brief is ill-founded. There, the Court declined to grant standing to the petitioner in a proceeding attacking the action of an administrative agency. While recognizing that the type of injury sufficient to create standing *where statutes authorize review of federal agency actions* has been somewhat expanded, the Court made clear, even in those cases:

> "But broadening the categories or injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must have himself suffered an injury." (40 U.S.L.W. at p. 4401)

The instant proceeding does not involve a federal agency, nor a constitutional question and there has been no deviation by this Court from the traditional requirements that direct, substantial and economic interests must be af-

fected for standing to exist in other types of cases, such as the instant proceeding. Moreover, even under the somewhat broader concepts of standing applied in administrative agency proceedings or where constitutional questions are presented, "the party seeking review must have himself suffered an injury" as the Court stated in *Sierra Club* v. *Morton, supra.* The only harm that could result to petitioners by virtue of the District Court's order below is that the treble damage plaintiffs will be given access to the same information which the petitioners had previously obtained. Such a result cannot constitute the required "injury" upon which to predicate standing, nor have petitioners cited a single case in which standing was permitted on such a tenuous ground.

Finally, if error was committed by the District Court below, which it was not, or if the use of the grand jury transcripts is objected to by the petitioners at some point in the treble damage proceedings, the petitioners will be free to seek redress at the appropriate time. A one-year delay in these proceedings has already occurred as a result of petitioners' appeal, motion for reargument and the instant petition. It is respectfully submitted that petitioners have shown no reason to further delay these proceedings by piecemeal litigation.

POINT II

The District Court did not abuse its discretion in granting the treble damage plaintiffs access to a portion of the grand jury transcripts sought and to which petitioners had previously acquired access. Moreover, whether or not the District Court abused its discretion is not a sufficient basis for granting the writ of certiorari.

Having determined that petitioners' appeal should be dismissed on the ground that they lacked standing, the Court of Appeals did not pass upon the question as to whether or not the District Court erred in making available to the treble damage plaintiffs transcripts of grand jury testimony to which defendants themselves had previously obtained access from the same Court. It is respectfully submitted that the District Court committed neither an abuse of discretion nor, as the cases would require for reversal, "a manifest abuse of discretion." *Atlantic City Electric Company* v. *A. B. Chance Company,* 313 F.2d 431, 434 (2nd Cir. 1963); *Nairn* v. *Clary,* 312 F.2d 748 (3rd Cir. 1963); *In re Grand Jury Proceedings,* 309 F.2d 440 (3rd Cir. 1962).

Chief Judge Augelli found "particularized need" for the disclosure of grand jury testimony based upon the following factors:

1. "[The] transcripts relating to the minutes of the particular employees and officers of the defendants have been seen and made available to the defendants"; and

2. "A lot of time has elapsed in this case—many, many years. Some affidavits made by witnesses of the

defendants indicate a lapse of memory here or there, or no clear recollection of what happened." (Tr. of Hearing of Aug. 30, 1971, pp. 180-181, a copy of which is annexed hereto as Appendix C.)

Under the following circumstances, it is respectfully submitted that Chief Judge Augelli committed no such abuse or manifest abuse of discretion.

1. The treble damage defendants had already debriefed the same witnesses whose grand jury transcripts are the subject of this appeal and had freely circulated their debriefing statements to the other defendants.

2. The treble damage defendants had successfully obtained access to the transcripts in issue based upon affidavits of the grand jury witnesses who affirmed that they had little recollection of what their testimony had been before the grand jury.

3. In previously granting treble damage defendants access to the grand jury testimony of their employees and former employees, the Court expressly found that no grounds existed to retain the secrecy of the grand jury testimony at issue. *United States* v. *American Oil Company,* 286 F. Supp. 742, 753 (D. N.J. 1968).

4. The grand jury investigation began in 1963, and concerned events which commenced in 1955, some 16 years prior to the order which is the subject of the instant petition.

5. The criminal action which followed the grand jury investigation terminated in 1969, upon the plea by each of

the appellants of *nolo contendere,* and the civil action terminated pursuant to a consent decree in August of 1971.

6. Judge Augelli did not grant the parties access to *all* grand jury testimony sought by the treble damage plaintiffs. His order was limited only to the transcripts to which defendants had access. The Court's order specifically provided that the transcripts would be kept confidential.

Petitioners' entire argument on this issue is predicated upon their contention that "* * * proceedings before a grand jury are to be kept secret." (Petitioners' Brief, p. 8). Having successfully obtained a court order to breach that secrecy and having freely circulated that which they now claim to be "inviolate", petitioners have themselves destroyed the basis upon which they have predicated their argument. Petitioners' only complaint at this juncture of the proceedings is that the truth will be as freely accessible to the treble damage plaintiffs as it was to them.

There remains not a single policy reason which would be served by denying the treble damage plaintiffs the same information which petitioners had previously sought and obtained from the Court below. In fact, as set forth below, it is highly questionable as to whether or not Judge Augelli was required to find "particularized need." In any event, the Court made an express finding of particularized need which could not be considered a manifest abuse of discretion under the circumstances of this litigation.

The rule of grand jury secrecy is ancient. Originally intended as a protection for defendants, it became, in the last century, a protection for the prosecution. Calkins,

Grand Jury Secrecy, 63 Mich. Law Rev. 455 (1965). Every prosecutor and former prosecutor has an instinctive fear that any exceptions to the permanent secrecy of grand jury testimony will hamper prosecutions. The conflict between this feeling and the general trend towards full disclosure resulted in the enunciation of the standard of "particularized need", applicable when criminal defendants sought certain grand jury testimony. *United States* v. *Procter & Gamble Company,* 356 U.S. 677 (1958); *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959); *Dennis* v. *United States,* 384 U.S. 855 (1966).

There are five reasons which form the current basis of grand jury secrecy. As classically formulated in *United States* v. *Amazon Industrial Chemical Corp.,* 55 F.2d 254, 261 (Dist. Md. 1931) and subsequently quoted in *United States* v. *Procter & Gamble Company,* 356 U.S. 677, 681, Note 6 (1958), they are:

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no possibility of guilt."

When these reasons cease, the need for grand jury secrecy ceases. In fact, it has already been recognized by the courts and by Congress recently that in the situation where grand jury disclosure is most frequently sought, where a criminal defendant requests grand jury testimony of a trial witness, that there does not exist any requirement of "particularized need" because grand jury secrecy no longer serves the policies stated above.

Following the *Dennis* case, *supra,* the Court of Appeals for the Second Circuit held that when a witness has testified upon a criminal trial, the defendant was entitled to see his relevant grand jury testimony without any showing of "particularized need", *United States* v. *Youngblood,* 379 F.2d 365 (2d Cir. 1967). In *United States* v. *Youngblood, supra,* the Second Circuit expressly held that cases such as *United States* v. *Procter & Gamble Company, supra,* and *Pittsburgh Plate Glass Co.* v. *United States, supra*:

> "* * * merely indicate a minimum standard to which the courts must adhere, and do not limit the court's power to order disclosure in additional situations where a showing of particularized need has not been made." (379 F.2d at p. 369)*

In *Cargill* v. *United States,* 381 F.2d 849 (10th Cir. 1967), the Court of Appeals for the Tenth Circuit reached the same result by finding that "particularized need" was

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* In *Youngblood,* the Court held that if the Government opposes disclosure, it must show that such disclosure "would jeopardize national security" or a similar reason (*supra,* p. 370). In the instant case, the Government has not appealed and no one has even suggested that any interest, other than possibly the posture of the defendants in the treble damage action would be jeopardized by disclosure. See also *United States* v. *Hughes,* 413 F.2d 1244 (5th Cir. 1969), and *Harris* v. *United States,* 433 F.2d 1127 (D.C. Cir. 1970).

established simply by the witness having testified at trial and the defense's demand for the grand jury transcript. In 1970, Congress accepted these rulings and enacted them as an amendment to the Jencks Act, 18 U.S.C. Sec. 3500(e)(3), added by P.L. 91-452, Title I, Sec. 102, October 15, 1970, 84 Stat. 962. As a result of this amendment, a criminal defendant is now entitled to the relevant grand jury testimony of any trial witness, without any showing of "particularized need."

The American Bar Association's Project on Minimum Standards for Criminal Justice has gone still farther and recommended that in all cases, the grand jury testimony of the defendant and of all persons whom the prosecution intends to call as witnesses at the trial should be turned over to the defendant in advance of trial. *Standards Relating to Discovery and Procedure Before Trial,* Standard 2.1(a)(iii) and Commentary (1970).

Since the indictment here was handed down and the grand jury dismissed long ago, and both the criminal case and the Government's civil case have now been concluded, the first three of the traditional reasons are obviously inapplicable here.

All of the petitioners investigated by the grand jury were named defendants in the now concluded Government criminal and civil actions; accordingly, Reason No. 5 is therefore inapplicable, as well. The petitioners have pleaded *nolo contendere* to the criminal charges and have entered into a consent decree with respect to the Government's civil action.

Reason No. 4 is equally inapplicable. The "anti-intimidation" rationale, though frequently cited, is of little force when applied to the period after indictment and apprehension of the defendant. Any witness before a grand jury understands that he may be called upon to repeat his testimony at trial and that his secrecy can, at most, last until that point. The Government similarly knows that it may call upon any witness for such testimony, and it cannot and does not offer witnesses a promise of secrecy beyond the trial. In many jurisdictions, in fact, the witnesses' names must be released by the prosecution in advance of trial and the witnesses' identities do not remain secret much beyond the handing up of the indictment. It is for this reason that Wigmore, not generally known for his partiality to defendants, states that once the grand jury has ceased its function, the secrecy as to the witnesses' testimony should cease. 8 *Wigmore on Evidence,* §2362 (McNaughton Rev. 1961).

Whatever may be the general merit of the "anti-intimidation" rationale, it has no force in this case, now that both the Government's cases have been concluded. Moreover, the grand jury testimony in question is that of petitioners' own employees; the petitioners were the criminal defendants, and it was the petitioners themselves from whom intimidation was most to be feared. Their employees' testimony has already been turned over to the petitioners, the witnesses were questioned about their testimony by the petitioners and the results of those questionings were freely circulated among all of the treble damage defendants. In fact, those witnesses disclosed their testimony to defendants immediately after they had testified.

What possible fear of intimidation is left now? It was the possibility of retaliation and intimidation which the Supreme Court cited in *United States* v. *Procter & Gamble Company, supra,* 356 U.S. at 682, as the most dangerous possible consequence of disclosure. That case and its successors, which also deal with disclosure to *defendants,* are therefore inapplicable here. Moreover, the fact that defendants had invaded grand jury secrecy by debriefing of witnesses has been held to constitute sufficient reason to disclose grand jury transcripts to treble damage plaintiffs. *State of Illinois* v. *Harper & Row Publishers, Inc.,* 50 F.R.D. 37, 42 (E.D. Ill. N.D. 1969).

In short, there is no reason to withhold information which is no longer a secret from anyone in this litigation except the treble damage plaintiffs. The position of the petitioners, who themselves committed the most serious breach of the grand jury secrecy in this case, should carry no weight whatsoever.

Petitioners have cited not a single case in which the Court has denied disclosure of grand jury testimony to treble damage plaintiffs after it has been disclosed to the defendants themselves. Nevertheless, the petitioners suggest that the disclosure of grand jury testimony will only be appropriate when the witnesses testify on depositions that they don't remember their grand jury testimony or the events which preceded that testimony. In other words, petitioners would require that deposition witnesses repeat exactly that which they stated on affidavits in support of their motion in the criminal action to breach grand jury secrecy—that they don't remember.

Under the circumstances, it is respectfully submitted that there exists no basis whatsoever to require the parties and the Court to participate in an expensive and time-consuming procedure to establish the lack of memory which the witnesses have acknowledged. The law should and does provide a more functional approach to the ascertainment of the truth.

It is further submitted that, even in the absence of prior disclosure to the treble damage defendants, Judge Augelli would have properly exercised his discretion in granting treble damage plaintiffs access to a portion of all of the grand jury transcripts which were sought. Well before the adoption of the Jencks Act, the courts held that a demonstrated failure of memory was sufficient to release a deposition witness's prior grand jury testimony. *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F.2d 431 (2d Cir. 1963), application for stay denied, 372 U.S. 699 (1963); *Donald J. Nairn* v. *Clary*, 312 F.2d 748 (3d Cir. 1963); *Consolidated Edison Co. of New York, Inc.* v. *Allis-Chalmers Mfg. Co.*, 217 F.Supp. 36 (S.D.N.Y. 1963); *State of Illinois* v. *Harper & Row Publishers, Inc.*, 50 F.R.D. 37 (N.D. Ill. E.D. 1969); *Brenan R. Sellers*, 32 F.R.D. 473 (N.D. Ill. 1962).

In the criminal actions, the witnesses' lack of recall was the very basis upon which the petitioners herein had obtained access to grand jury transcripts. Thus, the witnesses' acknowledged lack of recollection of their grand jury testimony and of events which preceded that testimony furnishes sufficient "particularized need" even without regard to the fact that the petitioners have already ob-

tained access to that which they now seek to bar from treble damage plaintiffs.

Having obtained the grand jury testimony, and having debriefed grand jury witnesses and circulated such "secret" information among themselves, there can be absolutely no basis for petitioners to claim that Judge Augelli committed a manifest abuse of discretion in finding "particularized need", even if such a standard were required in the circumstances of this litigation.

Conclusion

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH CALDERON, Esq.
DAVID BLASBAND, Esq.
Attorneys for Respondents,
Yellow Cab Company of Philadelphia,
Yellow Cab Co. of Camden, and
Yellow Limousine Service, Inc.
110 East 59th Street
New York, N. Y. 10022

LINDEN AND DEUTSCH
Of Counsel

APPENDICES

Appendix A

Affidavit of Donald R. Beal

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Criminal No. 153-65

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY, THE ATLANTIC RICHFIELD COMPANY, CITIES SERVICE OIL COMPANY, CITIES SERVICE COMPANY, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, SINCLAIR REFINING COMPANY, and MOBIL OIL CORPORATION,

Defendants.

Commonwealth of Australia)
State of Victoria)
City of Melbourne) ss.:
Consulate General of the United)
States of America) ss.:

DONALD R. BEAL, being duly sworn, deposes and says:

1. On October 29, 1964, I testified under subpoena before a grand jury of this Court. I understand that this grand jury subsequently returned an indictment against Mobil Oil Corporation ("Mobil") and others. I make this affidavit in support of a motion by Mobil for an order permitting its counsel to inspect and copy the transcript of my testimony before the grand jury.

2. I am informed that the indictment covers the period January 1, 1955 through April 8, 1965. Prior to 1957, I was employed by Mobil in various resale sales positions. None of these positions was in Pennsylvania, New Jersey

or Delaware. From 1957 through September 30, 1958, I was District Manager of Mobil's New Haven (Connecticut) Resale District; from October 1, 1958 through January 31, 1961, I was Resale Sales Manager of Mobil's Philadelphia Division; from February 1, 1961 through December 31, 1962, I was Division General Manager of Mobil's Philadelphia Division; from January 1, 1963 through March 31, 1966, I was Division General Manager of Mobil's West Coast Division.

3. I have little specific present recollection of my testimony before the grand jury more than three years ago. I do recall that I was shown several documents and was questioned about contacts and communications with representatives of other oil companies in Pennsylvania, New Jersey and Delaware in the period 1958 to 1963.

4. I have no objection to the disclosure of the record of my testimony to Mobil's counsel for use in this case. In fact, I request that such disclosure be ordered so that if I should be a witness at the trial of this case, my testimony before the grand jury can be used to refresh my recollection. I am presently employed by a subsidiary of Mobil, Mobil Oil Australia Limited, and I make this affidavit voluntarily and without coercion.

/s/ Donald R. Beal

Donald R. Beal

Sworn to before me this
20th day of December, 1967.

/s/ John Q. White

John Q. White
Consul of the United States of America.
(Seal)

Appendix A

Affidavit of James B. Kelley

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Criminal No. 153-65

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY, THE ATLANTIC RICHFIELD COMPANY, CITIES SERVICE OIL COMPANY, CITIES SERVICE COMPANY, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, SINCLAIR REFINING COMPANY, and SOCONY MOBIL OIL CORPORATION,

Defendants.

State of Florida)
County of Pinellas) ss.:

JAMES B. KELLEY, being duly sworn, deposes and says:

1. On December 5, 1963 I testified under subpoena before a grand jury of this Court and I have been informed by counsel that this grand jury subsequently returned an indictment against Gulf Oil Corporation ("Gulf") and seven other oil companies. I make this affidavit in support of a motion by Gulf for an order permitting its counsel to inspect and copy the transcript of my testimony before the grand jury.

2. I am informed that the indictment covers the period from January 1, 1955 through April 8, 1965, during which period I held the following positions with Gulf:

a. From 1955 to December 31, 1958, Manager of Retail and Jobber Sales in the Philadelphia Sales Division, at Philadelphia, Pennsylvania.

b. From January 1, 1959 to December 31, 1959, Division Manager of the Philadelphia Sales Division, at Philadelphia, Pennsylvania.

c. From January 1, 1960 to July 31, 1960, Division Manager of the New York Sales Division, at New York City.

d. From August 1, 1960 to March 1964, Vice President for the Eastern Region, at Philadelphia, Pennsylvania.

e. From March 1964 to August 31, 1965, Regional Vice President located at Houston, Texas.

Retired from Gulf, effective August 31, 1965.

3. It has been over four years since I testified before the grand jury and I have at the present time only a general recollection of the matters on which I was questioned. I am unable to recall the details of my testimony at this time. I do recall that I was questioned about gasoline pricing policies of Gulf in the states of New Jersey, Pennsylvania and Delaware and in the course of my testimony I was shown some documents and questioned about many

sales transactions and communications between 1955 and 1963.

4. I do not object to the disclosure of the record of my testimony to Gulf's counsel for use in this case. Moreover, I request that such disclosure be ordered for the reason that in the event I should be a witness at the trial of this case my grand jury testimony can be used to refresh my recollection. I am not presently employed by Gulf, and I make this affidavit of my own free will and without any coercion.

/s/ James B. Kelley

James B. Kelley

Sworn to before me this
22 day of December, 1967.

Joan M. Brown
Pinellas County
State of Florida

Appendix A

Affidavit of Albert F. Spangenberg

Privileged and confidential for use only by defendants' counsel in the captioned action.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Criminal No. 153-65

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY, *et al.*,
Defendants.

State of Maryland)
County of Baltimore) ss.:

ALBERT F. SPANGENBERG, being duly sworn, deposes and says:

1. My most recent position with Humble Oil & Refining Company ("Humble") was operations coordinator, Eastern Esso Region. I retired in July, 1966. On June 4, 1964 I testified under subpoena before a grand jury of this Court. I understand that this grand jury subsequently returned an indictment against Humble and others. I make this affi-

davit in support of a motion by Humble for an order permitting its counsel to inspect and copy the transcript of my testimony before the grand jury.

2. I am informed that the indictment covers the period January 1, 1955 through April 8, 1965. During that time I occupied the following positions with Humble and its predecessor corporation:

	Title	*Geographic Location*
1/1/55	Assistant to Operations Manager	Philadelphia, Pa.
2/1/55	District Manager	Philadelphia, Pa.
8/20/56	Merchandising Manager (Acting)	Bala-Cynwyd, Pa.
9/10/56	District Manager	Philadelphia, Pa.
3/1/57	Operations Manager (Rot. Assign.)	Del.-Md.-D.C. Div.
8/1/57	District Manager	Philadelphia, Pa.
6/17/60	District Manager (Spec. Assign.)	Philadelphia, Pa.
8/15/60	District Manager	Philadelphia, Pa.
11/1/62	Service Station Sales Mgr. (Rot. Assign.)	Bala-Cynwyd, Pa.
6/3/63	Marketing Manager—Pennsylvania	Baltimore Area, Baltimore, Md.

3. I have little specific present recollection of my testimony before the grand jury three and one-half years ago.

I do recall that I was questioned about many meetings, communications and events which were alleged to have occurred between 1955 and 1962. The questions related to sales of gasoline in Pennsylvania, New Jersey and Delaware.

4. I have no objection to the disclosure of the transcript of my testimony to Humble's counsel for use in this case. In fact, I request that such disclosure be ordered so that if I should be a witness at the trial of this case, such testimony can be used to refresh my recollection. I make this affidavit voluntarily and without inducement or coercion.

/s/ Albert F. Spangenberg

Albert F. Spangenberg

Sworn to before me this
21st day of December, 1967.

My Commission Expires July 1, 1967

Appendix A

Affidavit of Fred C. Bowman

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Criminal No. 153-65

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE OIL COMPANY, CITIES SERVICE COMPANY, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, SINCLAIR REFINING COMPANY, and SOCONY MOBIL OIL CORPORATION,

Defendants.

Commonwealth of Pennsylvania)
County of Philadelphia) ss.:

FRED C. BOWMAN, being duly sworn, deposes and says:

1. On October 29, 1964, I testified under subpoena before a grand jury of this Court. I understand that this grand jury subsequently returned an indictment against The Atlantic Refining Company (now Atlantic Richfield Company, hereinafter referred to as "Atlantic Richfield") and others. I make this affidavit in support of a motion by Atlantic Richfield for an order permitting its counsel to inspect and copy the transcript of my testimony before the grand jury.

2. I am informed that the indictment covers the period from January 1, 1955 through April 8, 1965. From December 16, 1953 to February 1, 1956, I was General Sales Manager of Atlantic's Brazilian subsidiary—Atlantic Refining Company of Brazil; from February 1, 1956 to October 6, 1958, I was Manager National Accounts and Commercial Sales for Atlantic Richfield; from October 6, 1958 to March 1, 1959, I was Manager, Wholesale Marketing of the Eastern Pennsylvania Sales Group for Atlantic Richfield; from March 1, 1959 to January 27, 1964, I was District Manager, Wilmington District for Atlantic Richfield; and from January 27, 1964, I was Wholesale Marketing Manager, Central Region, for Atlantic Richfield.

3. I have no specific recollection of my testimony before the grand jury. I do recall that I was questioned about transactions and communications which occurred between 1955 and 1962. The questions related to sales of gasoline in Pennsylvania, New Jersey, and Delaware.

4. I have no objection to the disclosure of the record of my testimony to Atlantic Richfield's counsel for use in this case. In fact, I request that such disclosure be ordered so that if I should be a witness at the trial of this case, it can be used to refresh my recollection. I make this affidavit voluntarily and without coercion.

/s/ Fred C. Bowman

Fred C. Bowman

Sworn to before me this
18 day of December, 1967.

Notary Public
Philadelphia County
My Commission Expires March 4, 1968

Appendix A

Affidavit of Walter S. Hine

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Criminal No. 153-65

UNITED STATES OF AMERICA

v.

THE AMERICAN OIL COMPANY, THE ATLANTIC RICHFIELD COMPANY, CITIES SERVICE OIL COMPANY, CITIES SERVICE COMPANY, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, SINCLAIR REFINING COMPANY, and SOCONY MOBIL OIL CORPORATION,

Defendants.

State of New Jersey)
County of Gloucester) ss.:

WALTER S. HINE, being duly sworn, deposes and says:

1. On November 12, 1963, I testified under subpoena before a grand jury of this Court. I understand that this grand jury subsequently returned an indictment against Cities Service Oil Company ("Cities") and others. I make this affidavit in support of a motion by Cities for an order permitting its counsel to inspect and copy the transcript of my testimony before the grand jury.

2. I am informed that the indictment covers the period January 1, 1955, through April 8, 1965. From 1955 to May 15, 1961, I held several managerial positions in Cities' Philadelphia Division, and had responsibility for sales in southern New Jersey, Greater Philadelphia and Delaware. I resigned from Cities on May 15, 1961. Since May 15, 1961, I have been Vice President of Consumers Oil Service Inc., Paulsboro, New Jersey. Consumers Oil is a distributor of Cities' products, and approximately one-third of its stock is owned by Cities.

3. I have little specific present recollection of my testimony before the grand jury more than four years ago. I do recall that I was questioned about many sales transactions and communications which occurred between 1956 and 1961. The questions related to sales of gasoline in Pennsylvania and New Jersey.

4. I have no objection to the disclosure of the record of my testimony to Cities' counsel for use in this case. In fact, I request that such disclosure be ordered so that if I should be a witness at the trial of this case, it can be used to refresh my recollection. I am not presently employed by Cities, and I make this affidavit voluntarily and without coercion.

/s/ WALTER S. HINE

Walter S. Hine

Sworn to before me this
day of December, 1967.

(Signature illegible)

Appendix B

Answer of Defendant Atlantic Richfield to Plaintiffs' Interrogatory 1, Set 1

* * *

(b) During the period covered by this interrogatory the Company did not obtain summaries of any grand jury transcripts; counsel* for the Company did, however, interview the above named witnesses called by the grand jury and prepared recall statements for each such witness; the precise dates of the statements are unknown, but generally the interviews were conducted on the same day the witness appeared before the grand jury.

(c) Counsel for the Company.

(d), (e), (f) & (g) Two copies of the recall statements are presently in the possession of counsel.

(In addition, counsel for certain of the defendants inspected certain of the recall statements of grand jury witnesses employed by other defendants and made summaries thereof. Information responsive to this interrogatory with respect to interviews of individuals employed by other defendants is being furnished by each such defendant. Accordingly it would be unnecessarily duplicative to attempt to supply such information here.)

* * *

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* The firm of Hughes Hubbard & Reed has been counsel for the Company in the above captioned cases since July 17, 1967. Prior to that date counsel for the Company in these cases was the firm of Howrey Simon Baker & Murchison, 1707 H Street, N.W., Washington, D.C. References to "counsel" hereinafter shall include counsel for the Company at the time in question and/or counsel employed in the Company's legal department.

Appendix C

Transcript of Hearing Held on August 30, 1971 (pp. 180-181)

* * *

[Page 180]

[THE COURT:] "Now we come to the big fellow—H [Grand Jury Transcripts]. That's the big one.

"A lot of time has elapsed in this case—many, many years. Some affidavits made by witnesses of the defendants indicate a lapse of memory here or there, or no clear recollection of what happened. And, in all fairness, it would have to be an extraordinary memory that could recall today what happened years ago.

"In addition to the lapse of time, we have another factor here which I think is important. And that is that those transcripts relating to the minutes of particular employees and officers of the defendants

* * *

[Page 181]

have been seen and made available to the defendants.

"I think if you combine those two things—lapse of time plus the fact that they have already been seen by the defendants—that makes out, in my opinion, a sufficient reason for making them available also to the treble damage plaintiffs. That's enough particularized need for me.

"So you will have access to the transcripts that defendants saw, or those which were made available to them. As to the others—no. However, you always have the right to come back and show a particularized need to get those transcripts.

"Now, I am going to give you a bonus. The Government has said it will make known the names of all those who testified before the grand jury. I will say that those names should be made available not only to the treble damage plaintiffs, but at the same time to the defendants.

"I think that takes care of everything."

• • •

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-93

THE AMERICAN OIL COMPANY, ET AL., *Petitioners*

v.

CITY OF PHILADELPHIA, ET AL.

REPLY BRIEF OF PETITIONERS

In their briefs in opposition,[1] the respondents raise one point not already dealt with in the petition for the writ of certiorari. That point concerns the appealability of the district court's order directing disclosure of grand-jury testimony to the private plaintiffs. The private plaintiffs now insist that that order was interlocutory, and that the court of appeals could rightly have declined to consider the petitioners' appeal on that ground.

As the private plaintiffs concede, the court of appeals did not pass on the appealability question (Pet. 2a). There can be no dispute, however, that the district

[1] The petitioners have been served with two briefs in opposition—one on behalf of the Yellow Cab Companies of Philadelphia and Camden, and Yellow Limousine Service, Inc.; and another on behalf of the City of Philadelphia, the State of New Jersey, McCloskey & Co., and others.

court's order was directly appealable to the court below. Unlike most disclosure orders, the order at issue was entered after final judgment; it cannot be deemed interlocutory because there was no future event that it might abide. Surely, if the order had been embodied as part of one over-all decree ending the government's case, there could be no question of its appealability to the court of appeals. The outcome should not differ simply because the order was contained in a separately captioned document.[2]

Other points raised by the respondents merit only passing refutation. Throughout the briefs in opposition, the respondents urge that the grand-jury witnesses have already conceded their lack of memory, and point to the affidavits filed by those witnesses in connection with the petitioners' successful efforts to obtain the grand-jury testimony before the New Jersey district court. The fact is that those witnesses conceded no such lack of memory. What they said (as appears in the affidavits reprinted in the appendix submitted by certain of the respondents) is that they had no specific recollection of their testimony *before the grand jury*. The record does not reveal whether they presently recollect

[2] Authority for the appealability of the district court order here under consideration is found in *United States* v. *United Fruit Co.*, 410 F.2d 553 (5th Cir.), *cert. denied sub nom. Standard Fruit & S.S. Co.* v. *United Fruit Co.*, 396 U.S. 820 (1969). There the district court approved an antitrust consent decree requiring the defendant to create a new company from its own assets. Shortly thereafter, the district court granted the defendant's motion for a protective order to guard against third-party discovery of documents submitted to the Court relating to compliance with the decree. A competitor company moved to obtain discovery, and appealed to the court of appeals from the district court's denial of its motion. The court of appeals held the post-judgment discovery order appealable—even though that order had denied the third-party motion without prejudice to renewal at a later time.

the events that were the subject of the grand-jury inquiry and of the present litigations. That question can be resolved only after the witnesses' depositions commence—by following the procedure utilized in the electrical equipment antitrust cases, discussed throughout the petition for certiorari.

The respondents also contend that this Court lacks jurisdiction to entertain the petition for the writ because the petition is styled *American Oil Co.* v. *City of Philadelphia*—coincidentally the title of one of the private suits now pending in the district court—rather than *American Oil Co.* v. *United States,* the title of this proceeding in the court of appeals. The respondents' contention is frivolous. The petition is captioned, in accordance with proper practice before this Court, to reflect the true parties at interest in the proceeding. R. Stern & E. Gressman, Supreme Court Practice, § 6.29, at 283-84 (4th ed. 1969).

For the reasons previously set forth, the petitioners pray that the Court grant their petition for a writ of certiorari.

Respectfully submitted,

SIMON H. RIFKIND
Attorney for Petitioners,
Office and P.O. Address
345 Park Avenue
New York, N.Y. 10022
212—935-8000

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
JAY GREENFIELD
LEONARD H. BECKER
Of Counsel

Dated: September 12, 1972